33836

NATHAN SAMPSON,

Appellee,

v.

ALFRED BODO SCHWEINSBERG and LOUISE SCHWEINSBERG,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 27, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This is a fourth class action in the Municipal Court brought by the plaintiff against the defendants to recover a commission of $460 for negotiating a sale of real estate owned by the defendants. There is no dispute in regard to plaintiff being a duly licensed real estate agent of Chicago at the time of the transaction, and there is further no dispute that the contract of sale was entered into by the defendants to sell the property to the person whom plaintiff produced as a party able and willing to purchase the same at the price agreed upon; and that in the contract of sale the amount of the commission was made a part of the contract and fixed at the sum of $460.

There was a trial before court and jury, which resulted in the court's allowing the motion of plaintiff to instruct a verdict in his favor for the amount of the commission $460. The verdict was instructed against the objection of defendants. Defendants' motions for a new trial and in arrest of judgment were made and overruled, and the defendants bring the record here for our review by appeal.

There is but one question argued for reversal, which is that the court erred in instructing a verdict. The contract negotiated by plaintiff was offered and received in evidence, and in pursuance of the agreement of the defendants the amount of the commission to be paid plaintiff was evidenced by the agreement in these words: "to the payment of vendor's broker of a commission of $460 to Nathan Sampson", being the plaintiff in this suit.

The contract evidences that the property was sold through the instrumentality of plaintiff as a real estate broker for the sum of $17,000, and that the commission thereon, in accord with the rules of the Chicago Real Estate Board, was three per cent, of the purchase price, which would make $510. Defendants objected to pay the board rate and thereupon $460 was agreed upon as the amount which defendants would pay plaintiff as his real estate commission, and this agreement was evidenced by the provision in the contract above quoted.

Defendants contend that the court should not have instructed a verdict because in the then condition of the proofs there were questions of fact for the jury, not of law for the court, and challenge the ruling of the court in refusing to permit the defendant, Alfred Bodo Schweinsberg, to give evidence in contradiction of the fact regarding the amount of the commission inserted in the contract of sale, and the offer to prove by that defendant that at the time of the signing of the contract there was a conversation between the plaintiff and defendants that no commission was to be paid unless the sale was consummated. This witness had testified at the instance of plaintiff, under section 32 of the Municipal Court Act, that the contract was executed by the parties in his

presence and that the contract is in the same condition as it was when signed, and that the contract was in his possession from the day it was signed, and that no changes were made in it, and that plaintiff made a demand on him for $460, the amount of the commission in the contract, which he had never paid.

Defendants insist that plaintiff was not a party to the contract. Therefore the parol evidence rule does not apply and they should have been allowed to introduce parol evidence to vary the written terms of the contract as regards plaintiff's commission. This, however, is not the rule which controls. The rule was clearly stated by this court in Merchants Loan & Trust Company v. Unmach, 338 Ill. App. 67, where the court said:

> "A great many authorities are cited where it is stated that the rule prohibiting the admission of parol evidence to vary the terms of a written contract does not apply where the suit is brought by one not a party to the contract, but is applicable only in suits between the parties to the instrument. But upon a careful examination of all the authorities, we think this statement is not accurate. Where a third person, not a party to the contract bases his case upon it, and seeks to enforce it, the parol evidence rule applies."

Furthermore the defendants did not set up such a defense in their affidavit of merits. Neither did they deny the execution of the contract, but on the witness stand admitted the execution of the same with the covenant to pay the commission therein. In Grossfield & Roe Co. v. Junker Co., 305 Ill. App. 337, it was said:

> "A defendant in the Municipal Court is confined by the rules of that court to the defenses made in his affidavit of merits."

And in Madison v. Fortune Bros. Brewing Co., 163 ibid. 276;

> "In the Municipal Court all defenses the nature of which are not set up in the affidavit are waived and are unavailable on the trial."

In Isbitz v. Chicago City Ry. Co., 193 ibid. 488, it is said:

> "Where an affidavit of merits is filed specifying the nature of the defense relied on, all defenses the nature of which are not set out in the affidavit are considered waived."

At the time the defendants rested their case and the motion was made for an instructed verdict, the questions on the evidence resolved themselves into ones of law and not of fact, and therefore the court did not err in instructing the verdict.

No valid reason appearing in the record warranting the reversal of the judgment of the Municipal Court, it is affirmed.

AFFIRMED.

WILSON AND RYNER, JJ., CONCUR.

32848

MAX STUHLFAUT,

Appellee,

v.

JAMES W. OWENS,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

252 I.A. 635

Opinion filed Feb. 27, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This action results from a collision at the intersection of Montrose and Francisco Avenues in the City of Chicago, between the cars of the plaintiff and defendant, being driven at the time by the parties to this suit on January 20, 1926, at about the hour of six o'clock in the evening.

The cause was by agreement of the parties submitted to the court for trial (trial by jury being waived). There was a finding in favor of plaintiff and an assessment of damages in the sum of $375. Motions for a new trial and in arrest of judgment were made by the defendant and overruled, and the defendant brings the record here for our review by appeal.

The amount of the damages assessed is not in dispute, if they were properly assessable.

Defendant argues for reversal that there was a previous adjudication, and that the doctrine of res adjudicata is invokable as a defense, and that defendant had the right of way, and that the plaintiff was guilty of negligence.

Opinion filed Feb. 27, 1959

As to the attempt to invoke the doctrine of res adjudicata it is sufficient to say that he did not make such defense in his affidavit of merits, and that defense (nor any other for that matter) cannot be raised in this court for the first time.

In Consolidated Coal Co. v. Peers, 166 Ill. 361, it was said:

> "It is claimed by appellees in their brief that the question at issue in this cause was adjudicated in some former litigation between the parties to this suit, and that the matter here at issue is res judicata. There are no allegations in the declaration showing a former adjudication in respect to the questions or matters submitted in this suit for the decision of the court, nor is there any replication of res judicata, and so the necessary conclusion must be that no question of res judicata is raised by the record."

In Hahn v. Ritter, 13 ibid. 80, the rule applicable was laid down in the following terms:

> "It is a general rule in relation to actions for torts, that matters in discharge or justification of the action, must be specially pleaded, and cannot be given in evidence under the general issue. A former adjudication of the same cause of action, falls directly within this principle. It is distinctly held in the action of trespass, that a former recovery must be specially pleaded, and cannot be insisted upon under the plea of not guilty. 1 Chitty's. Pl. 10th Am. Ed. 506; Coles v. Carter, 6 Cowen, 691." People v. Oakridge Cemetery Corp. 328 Ill. 53.

Therefore the question of res adjudicata is not before this court for review.

A reading of the evidence impels us to the conclusion that the trial judge might have reasonably found therefrom that defendant was at fault and that his conduct in the driving and management of his car at or before the time of the

accident was the proximate cause of the collision. It is quite true, as stated by plaintiff in his brief, that it is not disputed that after the accident plaintiff's machine stopped at the southeast corner of the intersection of Montrose and Francisco Avenues, and that the defendant's car continued in motion after the collision over a parkway, over a sidewalk and into a driveway on the premises of a filling station situated at the southeast corner of the foregoing intersection, and that in its progress it knocked over two posts on the premises of the filling station, and that defendant "stepped on the gas" and "cut in front" of plaintiff's car when the two cars were distant from each other about thirty feet, and that plaintiff started to make the turn when defendant was about ten feet west of Francisco Avenue, and that defendant first saw plaintiff's car when it turned to the south; that defendant made no effort to stop his car when he saw plaintiff's car turning, and at the time of the accident Montrose Avenue was poorly lighted west of Francisco Avenue, although the intersection was well lighted, and that the accident occurred about six o'clock in the evening.

From plaintiff's testimony it appeared that he looked west before starting to turn and did not see defendant's automobile coming from the west, and that the visibility was about half a block.

If the trial judge, as his finding indicates, concluded that the preponderance of the evidence regarding the occurrence was with the plaintiff, and that defendant had failed to overcome the same by competent evidence, and that

the situation of the cars after the accident was a strong factor, demonstrating that the negligence of defendant was the primary cause of the damage to plaintiff's car, that was sufficient to justify the court's finding in favor of plaintiff.

In regard to the contention of defendant that he had the right of way, we would reiterate what is said in Green v. Di Cristofaro Gen. No. 32857, in an opinion filed coincidently with this one, "that the motor vehicle act was never intended to give the party claiming the right of way under its provisions, the right to proceed in a reckless or careless manner in driving a car through an intersection. Each of the parties so driving must proceed with due circumspection and care, and what is due care and circumspection must be adjudged from the evidence of the situation and the conditions confronting the parties at and immediately preceding the accident. In other words, the act, supra, does not relieve a driver at any time from the exercise of due care in the operation of his car. Heidler v. Wilson, 243 Ill. App. 69; Salmon v. Wilson, 227 Ibid. 286."

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON & RYNER, JJ., CONCUR.

122a

32857

ROBERT J. GREEN,
Appellee,

v.

FRANK DI CRISTOFARO,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 27, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This litigation arises from a collision between two automobiles at the intersection of Gladys Avenue and Lockwood Street, in the City of Chicago. Each party brought a suit against the other for damages in the Municipal Court. These suits were consolidated for trial under the agreement that if plaintiff was entitled to recover, his damage should be assessed at $700, and if defendant was entitled to recover in his suit, his damage was agreed to be the sum of $150.

The case was submitted to the court for trial and there was a finding in favor of the plaintiff and an award of damages of the sum of $700, and the finding in defendant's suit was against him. Upon plaintiff's claim there was a judgment for $700 and defendant brings the record here by appeal for our review.

Defendant argues for reversal that plaintiff's version of the occurrence was impossible, that the finding of the court was against the manifest weight of the evidence, and that plaintiff is barred from recovery on account of contributory negligence imputable to him.

Opinion filed Feb. 27, 1989

On the first proposition we are not able to agree with defendant's characterization of plaintiff's proof. Plaintiff's evidence is a connected and a believable story, supported by the testimony of three witnesses. It appears that plaintiff's car was proceeding at a reasonable rate of speed across the intersection of Gladys Avenue and Lockwood Street, and had nearly crossed when defendant's car, driven at a high rate of speed, struck plaintiff's car in the rear, virtually demolishing it. This theory is supported by the testimony of the son of the plaintiff, who was driving the car, and the witnesses, Francis and James O'Brien, who were riding in the car at the time of the accident.

As to the second point, we are not in accord with defendant's contention that the finding of the trial judge is against the manifest weight of the evidence, for if the trial court believed plaintiff's witnesses and gave credence to their testimony regarding the collision as more dependable and of more probative force than that of defendant and his witnesses, which the trial court had a perfect right to do if he came to such a conclusion, such testimony is amply sufficient to sustain the finding of the court.

There was a contradiction in the testimony of the parties in regard to the speed at which the respective cars were being driven. That was a matter for the trial judge to decide from all the evidence, and as shown by the court's conclusions, we must assume that the court found from the evidence that there was not sufficient proof to charge plaintiff with being guilty of any negligence contributing to the accident. To sustain the contention of defendant that plaintiff was guilty of contributory negligence, he invokes Section

22 of the Motor Vehicle Act. which provides, inter alia:

> "that if the rate of speed of any motor vehicle * * operated on any public highway in this State outside the closely built up business portions and the residence portions within any incorporated city, town or village, exceeds 20 miles an hour * * such rates of speed shall be prima facie evidence that the person operating such motor vehicle * * is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

The section of the Motor Vehicle Act invoked by defendant was never intended to give the party claiming the right of way under its provisions, the right to proceed in a reckless or careless manner in driving a car through an intersection. Each of the parties so driving must proceed with due circumspection and care, and what is due care and circumspection must be adjudged from the evidence of the situation and the conditions confronting the parties at and immediately preceeding the accident. In other words, the act, supra, does not relieve a driver at any time from the exercise of due care in the operation of his car. Heidler v. Wilson, 243 Ill. App. 89; Salmon v. Wilson, 227 Ibid. 286.

It is true that in the Salmon case, supra, the court held that unlawful speed is prima facie evidence of negligence. From the evidence of plaintiff the court might reasonably conclude, if he believed such evidence in preference to the evidence of defendant on the same subject, that the plaintiff's car at the time of the collision was not going at a rate of speed in excess of that of the statute, supra, and that the statute was not violated by plaintiff. Therefore he did not offend against it and was not guilty of contributory negligence. The trial judge was warranted in believing the evidence of

22 of the Motor Vehicle Act, which provides, inter alia:

> "that if the rate of speed of any motor vehicle operated on any public highway in this Province is the closely built up portion of a municipality or the residence portions of an incorporated city, town or village, exceeds 15 miles an hour ... the motor of speed shall be prima facie evidence that the person operating such motor vehicle ... is operating at a rate of speed greater than is reasonable and proper, having regard to the location and the use of the way so as to be a nuisance or to endanger the life or limb or injure the property of any person."

The sections of the Motor Vehicle Act invoked by defendant was never intended to give the municipal authorities the right of any person like prosecution, the right to proceed in a manner not in accordance with the law, or to interfere in interaction. Each of the offences is criminal and concerned with due administration and prosecution, for which is not also the administration must be obtained from the evidence of the attention and the qualifications concerning the matters of the immediately preceding the accident. In other words, the act, *supra*, does not relieve a driver of any fine from the exercise of the care in the operation of his car. *Lafleur* v. *Gibson*, 1943 S.C.R. 100; *Gordon* v. *Gibson*, and Ont. Inc.

It is not that on the *Gibson* case, *supra*, the court held that evidence based in *Jones Creek* evidence of negligence from the evidence of plaintiff the court might reasonably conclude, if he believed such evidence to outweigh in the evidence of defendant on the same matter, that the plaintiff's car at the time of the collision was not going at a rate of speed in excess of that of the statute, *supra*, and that the statute was not violated by plaintiff. Therefore he did not offend against it and was not guilty of contributory negligence. The trial judge was convinced in believing the evidence of

plaintiff that his car was being driven at a speed of twenty miles an hour when approaching the crossing at South Lockwood Street, and slowed down at the crossing, and the testimony of the witness, Francis O'Brien that the car stopped before crossing South Lockwood Street. The trial judge evidently gave credence to the testimony of these witnesses regarding the speed of the car, which was sufficient, if believed, to absolve plaintiff of any charge of contributory negligence.

From a scrutiny of the evidence we find that there was sufficient evidence from which the trial judge might reasonably come to the conclusion that plaintiff sustained his claim, and such evidence is sufficient, in our opinion, for that purpose. As held in Foster v. Swanson, 189 Ill. App. 344, this court, where conflicting evidence is properly submitted to the jury, will not disturb the verdict because greater credence and weight might have been given to the evidence in favor of one party than that in favor of the other, and the weight that this court will give to the verdict of a jury will be the same as that accorded to the finding of the trial judge, where the trial is before the court without the intervention of the jury.

For the foregoing reasons the judgment of the Municipal Court is affirmed.

AFFIRMED.

RYNER, J., Concurs.

WILSON, J., Specially Concurring:

I concur in the conclusion arrived at in the opinion, but not for all the reasons stated therein. Under the facts as read by me in the testimony, the plaintiff had the right-of-way under the Statute at the intersection where the accident occurred.

The section of the Statute relied upon by the defendant has no application to intersections. There is no evidence in the record showing whether the place where the accident happened was a residential district or a closely built up business portion, nor any evidence on behalf of the defendant as to the character of the place which might bring it within the Statute. There is nothing in the abstract to show the accident happened in an incorporated town other than that it was tried in the Municipal Court of Chicago.

In view of the fact that the trial court heard the evidence and saw the witnesses and was in a better position to pass upon the question of negligence, I believe the judgment of that court should be affirmed on the facts.

The section of the Statute which gives to the Commissioner the authority to intervene, under is not silent in the record showing whether the grant under the original statute was a presidential function which could only be delegated jointly, nor are evidence on behalf of the defendant to the character of the grant which is being at issue in the case. There is nothing in the judgment to show the evidence presented in an unsupported form under that the it was issued in the ordinary course of business.

In view of the fact that the trial court failed to the evidence and our has evidence in an in a bench decision to rule upon the question of a failure to judgment of that court should be affirmed in the court.

33029

123a

JOHN BAUMGARTNER,

Appellee,

v.

STEFAN KREYZAK,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

25 I.A. 635

Opinion filed Feb. 27, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

The initial proceeding in this case was a judgment by confession under a power to confess a judgment on the note in suit.

On motion of defendant he was let in to plead, the judgment to stand as security until a trial was had. There was a trial before court and jury and the return of a verdict for plaintiff. On motion of defendant the trial judge granted a new trial. Such new trial was had and resulted the same as the previous trial in favor of plaintiff by the verdict of the jury assessing plaintiff's damages at the sum of $1922.66. Defendant again moved for a new trial and in arrest of judgment, which on plaintiff's remitting $59.66 from the amount of the verdict, both motions were denied, and a judgment entered on the verdict, less the amount of the remittitur, for $1863, and it was ordered that the judgment by confession stand in full force and effect as of its date, from which judgment defendant prosecutes this appeal.

The cause of action springs from what is commonly referred to as a judgment note made by defendant, payable to the order of David Herzog and by Herzog endorsed and del-

Opinion filed Feb. 27, 1952

ivered to plaintiff. Judgment by confession, found in the record, was entered. Defendant filed several pleas, among which were want of consideration, that plaintiff is not a bona fide holder in good faith of the note, etc. Defendant also filed an affidavit of meritorious defense, in which he swears that the note is a forgery. The defense of forgery was the principal issue of fact before the jury. Both plaintiff and defendant testified regarding the note and the signature of defendant thereon, and gave their several versions of the whole transaction leading up to the making of the note. Expert witnesses on handwriting testified for each of the parties, and Herzog, the payee and endorser of the note, was also a witness for plaintiff, who testified that he was present when the note was drawn and saw the defendant sign the same, and identified the signature of defendant on the note. The plea of a want of consideration of the note, in effect, admits the verities of the note, but claims a want of consideration for its execution and delivery. In view of the fact that the issues have been passed upon by two juries, both of which by their verdict rejected the plea of forgery, we hold that defendant is precluded by these verdicts from again litigating the facts passed upon by both juries contrary to his contention. In the nature of things there must be a limitation to trials, they cannot proceed interminably. Every person is entitled to a fair trial and when he has had two, in which the verdicts have been against him, his right to further proceed has been exhausted. An examination of the evidence in the record convinces this court that the evidence warrants the verdicts. Consequently it would be imprudent and a waste of time to order another trial. Defendant has twice presented his defenses to a jury, who found against his contentions. However unpleasing the result may be to him,

issued to plaintiff. Judgment by confession, typed in the record, was entered. Defendant filed every [illegible], among which were want of consideration, that plaintiff is not a bona fide holder in good faith of the note, etc. Defendant also filed an affidavit of meritorious defense, in which he averred that the note is a forgery. The defense of forgery was the principal issue of fact before the jury. Each plaintiff and defendant testified regarding the note and the signature of defendant thereon, and gave many several versions of the transaction leading up to the making of the note. Expert witnesses on handwriting testified for each of the parties, and Dorsey, the payee and endorsee of the note, was also a witness for plaintiff, who testified that he was present when the note was issued and saw the defendant sign the same, and identified the signature of defendant on the note. The plea of a want or consideration of the note, in effect, coupled with the verities of the note, for claims a want of consideration for the execution and delivery. In view of the fact that the issues have been passed upon by the jurors, both of which by their verdict rejected the plea of forgery, we hold that defendant is precluded by issue and its from doing litigating in their second suit by both juries contrary to the instruction. In the absence of fraud there must be a limitation to litigation, else it would become interminable. Every person is entitled to a fair trial but once on his last suit, in which the verities have been against him, no right to further proceed has been shown. An examination of the evidence in the record convinces this court that the evidence supports the verdicts. Consequently it would be improper for a waste of time to grant another trial. Defendant has twice prosecuted his defense to a jury, the found against his contentions. Perhaps considering the result may be to him.

the law says that he is not entitled to be further heard.

In City of Chicago v. McNally, 128 Ill. App. 375, it was held that where two juries have passed upon a case and found the same way an error to reverse must be clear and palpable. And in Narkiewicz v. Wachowski, 198 ibid 214, it was held that when two juries as well as two trial judges have concluded that the plaintiff's claim is meritorious and there is no substantial or prejudicial error apparent in the record, the appellate court will not disturb the judgment appealed from.

We find no errors in procedure.

It is assigned for error and argued that the hypothetical questions were erroneous, but no where in defendant's brief does he refer to a hypothetical question. An examination of the testimony of the experts abstracted fails to disclose a hypothetical question put to any of the expert witnesses. Their testimony is abstracted in narrative form and as typical of such is the testimony of James I. Ennis, an expert witness on hand writing. This testimony is set out in narrative form and in the abstract no hypothetical question appears to have been put to him, and as often ruled by this court we will not go to the record to find matter for reversal. There are a few questions appearing in the abstract which are neither objectionable in form or substance. The same remarks are equally applicable to the testimony of Rounds, an expert examiner of forgery and disputed hand writing, and what is said regarding the experts Ennis and Rounds is likewise applicable to that of the witness Woods.

We find no error in the admission or rejection of evidence by the trial judge.

As to the instructions, defendant objects to the following instruction given at the instance of the plaintiff, viz.,

> "If you believe from the evidence that the defendant did execute and deliver the note in question as alleged, and you further find from the evidence that the plaintiff purchased the same before maturity in the usual course of business, and for a valuable consideration, without knowledge of any facts which might impeach its validity as between the said Stefan Krzyzak and the person to whom the note was given, then the plaintiff is entitled to recover, although you may believe from the evidence that the said Stefan Krzyzak never received any consideration for said note."

and argues that the instruction is erroneous because it mixes up the question of execution with that of want of consideration without pointing out the difference in proof between the two pleas. We think this objection is not well taken. The court stated a correct principle of law applicable to the proofs. It was not necessary for the court to point out the difference in the instruction between the pleas denying the execution of the note and the one pleading want of consideration.

Defendant objects to the following instruction given at the instance of plaintiff:

> "You are instructed that the testimony of an expert is not given to you as a statement of fact, but merely as the opinion of the witness in the nature of evidence, and it should be received and considered with other evidence in the case. You are not bound to accept it as true, and, in determining what weight, if any, you should give to it, you should apply it to your own knowledge and judgment in connection with the testimony in regard to the evidence in the case,

We find no error in the admission of testimony of evidence by the trial judge.

As to the instructions, defendant objects to the following instruction given at the request of the plaintiff, viz.:

> "If you believe from the evidence that the defendant did execute and deliver the note in question as alleged, and you believe from the evidence that the plaintiff exhibited the note before a notary in the usual manner of business, and for a valuable consideration, [illegible] of any note which should [illegible] by [illegible] the said [illegible] to the note was given, then the plaintiff is entitled to recover, although you may believe from the evidence that the note [illegible] never received any consideration for said note."

and argues that the instruction is erroneous because it gives to the question of execution and [illegible] of a valid note without relating out the difference in [illegible] the place. We think this criticism is not well taken. The court stated a correct principle of law applicable to the facts. It was not necessary for the court to state the difference in the instruction because the discussion the execution of the note was the one disputed point of consideration.

Defendant objects to the following instruction given at the request of plaintiff:

> "You are instructed that the endorsement of a [illegible] is not prima facie a [illegible] of [illegible] not merely as the maker of the [illegible] of [illegible], and it should be accepted and [illegible] with other evidence in the case. If you do not find [illegible] to be true, and, in determining that matter, if you should find it so, you should apply it to your own [illegible] in connection with the testimony in regard to the [illegible] in the case."

> and you should accept such part as to you may, from all the facts and circumstances in the case, seem reasonable and trustworthy. You are at liberty to reject all of such testimony, if in your judgment, it is unreasonable and unworthy of belief."

We think this instruction under the evidence was not objectionable. It applied equally to plaintiff and defendant, as each of the parties had proffered expert witnesses. We see no legal objection to this instruction.

The record demonstrates that the parties were accorded a fair trial and that all of defendant's rights under the law were duly protected, and there being no reversible error found in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON AND RYBER, JJ., CONCUR.

33978

124a

PAULUS F. B. KOENIG,
Appellee,
v.
EDWARD C. CARRINGTON,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

255 I.A. 636

Opinion filed Feb. 27, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff rendered services to the defendant in the capacity of an attorney. No advance agreement was made as to the amount of the fees to be charged. The parties failing to agree as to the value of the services, after they had been rendered, the plaintiff brought suit in the Superior Court of Cook County. He obtained a jury verdict in his favor and, upon the verdict, recovered a judgment in the sum of $9,000.00. The defendant has appealed and says that the services rendered were not worth in excess of the sum of $3,000.00.

The defendant, Carrington, is also a lawyer and a man of considerable financial means. He practiced his profession in Maryland for a number of years and then in New York. He finally became involved in domestic difficulties of a very unsavory type and in 1924 he came to Chicago. His wife having refused to follow him to his new place of residence, he filed a bill for divorce in October, 1926, charging her with desertion. He employed a young attorney, named Madden, to represent him in the proceeding.

On the evening of December 2, 1926, John J. McManus, a New York attorney who had represented the defendant for a

number of years, Madden, Carrington and a business associate of the latter, Horace L. Haywood, met at the Congress Hotel in Chicago. An application for temporary alimony and solicitor's fees was to be made on behalf of Mrs. Carrington the next morning. The question of employing another Chicago attorney was discussed and Madden recommended that the plaintiff be retained. The plaintiff was called into the conference and employed. No arrangement about fees was made except that Madden, out of the presence of the plaintiff, told the defendant that he thought the plaintiff would be glad to resist the motion for temporary alimony and solicitor's fees for a fee of $100.00. The finances and income of the defendant were discussed. The plaintiff says that he was at the meeting from 8 o'clock in the evening until about midnight.

The motion which was set for the next morning was heard one week later. Mrs. Carrington petitioned the court for an allowance of $10,000.00 solicitor's fees, $500.00 per week alimony and $2,500.00 expense money. She was allowed $1,000.00 for solicitor's fees, $100.00 a week alimony and $750.00 for expenses. At the conclusion of the hearing on this motion, the defendant left for New York.

The plaintiff testified that at the meeting of December 2, 1926, he learned from the defendant and his attorney McManus, the history of the relationship between the defendant and his wife prior to their marriage and also the relationship between Mrs. Carrington and the defendant's brother, Campbell Carrington. He said that the defendant stated that he met Mrs. Carrington in Philadelphia when she was the wife of a Mr. Snyder; that he took her into his apartment in New York and lived with her; that her mother came to live with them; that two

number of years, Milton, negotiator and a medium liberalism of the latter, Edward L. Harrison, was at the Continental Hotel in Chicago. In applicating for temporary injunc, one attorney's fees was to be made on behalf of him. Interveners the must matter. The question of multiplication unable attorney was discussed the latter recommended that the fee be retained. The plaintiff not notice into the multiplication employed. In arrangement about fees was made except that Milton, out of the presence of the plaintiff, told the defendant that he thought the plaintiff would be glad to retain his motion for temporary alimony - in multiplicity, for a fee of $250.00. The fee was the amount of the attorney's fee discussed. The plaintiff was then on his way to the station from 8 o'clock in the evening until about midnight.

The motion which was set for the next morning was heard two weeks later. Mr. Harrison multiplied the sum for an allowance of $10,000.00 attorney's fee, $500.00 was paid alimony and $7,500.00 arrears alimony. The six thousand $1,000.00 the solicitor's fee, $500.00 a week alimony and $750.00 for expenses. In the consideration of the hearing on this motion, the defendant left the city.

The statutory requisite that is the residence of December 6, 1926, he lived from the defendant and his attorney Mahoney, the lawyer of the multiplication leaving the defendant and his wife prior to their marriage and also in multiplicity between Mr. Harrington and the defendant's counsel, Charles Harrington. He said that the defendant asked him to meet Mr. Harrington in Milwaukee and that he was in the city of Milwaukee, Harrington, that he had her live in New York and lived with her; that her mother came to live with them; that the

of her daughters came into his home to partake of his hospitality and that finally he learned of facts which led him to believe that, at the same time, he was contributing to the support of Mr. Snyder. His brother was also a member of the household, but was self-supporting. Facts tending to show a relationship of an intimate nature between Campbell Carrington and the defendant's wife were discussed. The plaintiff further testified that he advised the defendant that the facts were not sufficient to sustain a bill for divorce on the grounds of adultery but that they would support a suit for alienation of affections. He also said that he expressed the opinion that Mrs. Carrington was guilty of adultery and that evidence could be discovered which would sustain the charge but that the defendant resented the suggestion. This testimony stands uncontradicted.

At this meeting, according to the plaintiff, the defendant stated that the divorce case was only a secondary issue; that his principal object was to sever his business connections with his brother who was trying to ruin him financially through Mrs. Carrington and that he believed that if an adjustment of his business affairs could be accomplished he and his wife would become reconciled. This was denied by the defendant and McManus. Both of these witnesses also testified that it was understood that the plaintiff was employed for the sole purpose of handling the divorce case and that the New York lawyers were to take care of the defendant's financial matters.

Mrs. Carrington filed a cross-bill charging cruelty. Later the cross-bill was amended so as to include a charge of adultery on the part of the defendant. The defendant then

filed an amended bill alleging that his wife had deserted him and that she was guilty of adultery.

The cause came on for trial on April 6, 1927. After taking testimony and reading depositions for a period of six or seven days a settlement was effected. A second amended cross-bill was filed on behalf of Mrs. Garrington in which the only charge made was that of cruelty. She was granted a decree of divorce. The sum of $25,000 was paid to her in full settlement of all claims for alimony, solicitor's fees, dower rights and other claims. She was also given the household furniture upon which, according to one of the witnesses, the defendant placed a value of $15,000.00, or $20,000.00. As a part of the settlement several pending lawsuits in which the defendant was involved were dismissed. A severance of all business relationships between himself and his brother was accomplished by a sale of the defendant's holdings of stock in J. B. Lyon Company for a consideration of $400,000.00.

In the proceeding resulting in the judgment appealed from, there was introduced in evidence on behalf of the plaintiff a memorandum made by him, indicating in general terms the time spent and the character of the services rendered for the defendant. The details of the various items were supplied by the testimony of the plaintiff and other witnesses.

It appears, without substantial contradiction, that from the evening of December 2, 1926, until the thirteenth of the same month, the plaintiff was continuously engaged in preparation to resist the application for alimony, solicitor's fees and expense money, in attendance in court, and in frequent conferences with the defendant and others. Many of the

conferences extended into the late hours of the night. Most, if not all of them, required the plaintiff to go to a place of meeting outside of his office where the defendant would be secure from the service of court process. Particularly, the defendant was desirous of thwarting any attempt of Mrs. Carrington to have served upon him the writ of ne exeat.

The plaintiff, at the instance of the defendant, made three trips to New York, each consuming four or five days time. The first trip was made about the middle of January, 1927, and was for the purpose of conferring with the defendant, his New York lawyers and investigators, in reference to newly discovered evidence of adultery on the part of Mrs. Carrington and as to amending the bill of complaint to include that charge. On the other two trips the plaintiff conferred with the defendant, and his New York lawyers, and attended before commissioners taking depositions.

There is much discussion in the briefs about the role played by the plaintiff in the taking of depositions. They were taken in various cities in the state of New York, in Washington, D. C., in Atlantic City, and in Florida. The plaintiff attended only those taken in New York City. He declined to interrogate any of the witnesses and gave as a reason for his refusal that he considered that the defendant was embarking upon a fishing expedition, that the witnesses were hostile and untrustworthy, and that, if he was to try the case, he did not wish to place himself in the embarrassing position of being obliged to vouch for the dependability of the testimony given by them. He says that he sat in on the occasions in question for the purpose of observing the demeanor of the witnesses and rendering himself familiar with the

conferences extended into the late hours of the night. Most, if not all of them, required the plaintiff to go to a place of meeting outside of his office where the defendant could be secure from the service of court process. Continually, the defendant was desirous of discussing any aspect of his participation in suits started then and the suit at bar exist.

The plaintiff, at the instance of the defendant, made entry also to New York, that commencing "one or five days time. The first trip was made about the middle of January, 1957, and one for the purpose of conferring with the defendant, his New York lawyers and investigators, in order to be ready discovered evidence of delivery or non-delivery. Dorthy Lee had to be assuring the full of complaint in Jackie that stage. On the other hand the plaintiff conferred with the defendant, and his New York lawyer, and attended before commissioners taking depositions.

There is much discussion in the court about the role played by the plaintiff in the taking of depositions. They were taken in various cities in the state. If the time, in Rochester, N. Y., in Atlantic City, and in Miami. The plaintiff attended only three times in New York City. He decided to interrogate any of the witnesses and gave as a reason for his refusal that he considered that the defendant was insisting upon a finding of facts, that the witnesses were hostile and untrustworthy, and that, if he was to try the case, he did not wish to close himself in the embarrassing position of being obliged to vouch for the dependability of the testimony given by them. He says that he was in on the occasions in question for the purpose of observing the demeanor of the witnesses and endeavoring himself familiar with the

testimony as it came from the lips of the witnesses. The defendant admits that he desired the presence of the plaintiff for these purposes. McManus, although characterizing the position taken by the plaintiff as being illogical, conducted the examination of the witnesses. On the final hearing McManus read most of the depositions but otherwise the trial was conducted by the plaintiff. McManus was present and made suggestions about questions to be put to the witnesses.

Madden remained as one of the solicitors for the defendant from the time of the filing of the original bill of complaint until the entry of the final decree. He was a young attorney of only a few years experience and testified that he did not regard himself qualified to, alone, conduct the trial of an important contested divorce case. This was the reason for his suggestion that the plaintiff be employed. According to his testimony he worked with and under the direction and supervision of the plaintiff. They attended to all the routine matters, such as the serving of notices of motions and for the issuance of the commissions to take depositions, examining of notices and processes served and issued for the taking of depositions on behalf of Mrs. Carrington and appearing in court on motions to advance and motions to postpone the day of trial.

The plaintiff testified that he was directed by his client to conduct an extensive publicity campaign and that he devoted a considerable amount of time in talking to newspaper reporters. The defendant admitted that he gave some specific instructions to that effect and that when he telegraphed to the plaintiff to amend the bill of complaint so as to include the charge of adultery on the part of his wife he gave instructions

testimony as it came from the lips of the witnesses. The defendant should be helped, the interest of the Commonwealth for that purpose. Counsel, in fact, [illegible] the position taken by the District Attorney, discussed the examination of the witnesses. In the first hearing counsel had part of the examination and otherwise the trial was conducted by the District. Counsel was learned and was experienced about asked him to be not be the witnesses.

Counsel requested to see of the statutes for the defendant from the plan of the filing of the original list of questions until the trial of the first witness. He said a young of money of only a few years experience and therefore that he did not regard himself qualified by alone, without the trial of an important criminal [illegible] case. Yet, he was the reason for the suggestion that it [illegible] to employ associate to his assistance to assist with the cross the District and cross-examination of the witnesses. They attended to all the routine matters, such as the serving of notices of motions and for the issuance of the subpoenas to the witnesses, [illegible] ing of notices and [illegible] served and issued the [illegible] of depositions on behalf of the [illegible] and [illegible] as were on notice to witness and motions to continue the [illegible] of trial.

The District Attorney [illegible] was invited by his client to submit to counsel a memorandum [illegible] that he devoted a considerable amount of time in relation to [illegible] testimony. The memorandum indicated that he gave some specific instructions to the witnesses that also be interpreted to the District to mean the [illegible] of counsel as to [illegible] charge of military on the part of [illegible] instructions

to give the matter the fullest publicity when the pleading was filed.

It is undisputed that up until the trial of the case frequent communications passed between the parties. About fifty telegrams and twelve or fifteen letters were exchanged. There were also twenty to twenty-five long distance telephone conversations.

When the plaintiff was in New York he was in conference practically every day from early in the morning until after midnight except when in attendance upon the taking of depositions. This was not directly denied by the defendant, and McManus admitted that on one of the New York trips he saw the plaintiff every day and every night.

The defendant and McManus, with several witnesses, arrived in Chicago on April 1, 1927. From that date until the beginning of the trial five days later, the plaintiff spent long hours in attending conferences and in the examination of witnesses.

Upon the trial of the case, according to the plaintiff, about thirty-two witnesses were called to the stand and approximately two hundred exhibits were offered in evidence. McManus testified that only six or seven witnesses were examined and that the rest of the testimony was presented by depositions.

The plaintiff testified that he devoted a total of eighty days to the defendant's affairs. Sixty-nine days were consumed in office work, consultations and trips to New York. Eleven days were spent in attending Court. The three trips to New York required him to be absent from Chicago for fifteen

to give the matter the doubtful publicity when the pleading was filed.

It is noteworthy that in spite of the usual [illegible] frequent communications passed among the parties, some fifty telegrams and letters in [illegible] were exchanged. There were also twenty to twenty-five long distance telephone conversations.

When the plaintiff was in New York in mid-October, made strenuous every day from early in the morning until after midnight efforts then to withdraw from the letter of defendants. This was not directly denied by the defendants, and defendants admitted that on one of the days [illegible] the plaintiff every six and eight days.

The telephone and telegraph, with personal interviews, started in Chicago on April 1, 1907. From that date until the beginning of the trial five months later, the plaintiff spent long hours in attempting negotiations and in the exchange of attorneys.

Upon the trial of the case, testimony in the [illegible] tiff, about thirty-two witnesses were called in the plaintiff's and approximately [illegible] defendant contents were offered in evidence. Defendants testified that only six or seven telephone calls were made and that the rest of the testimony was received by correspondence.

The plaintiff instituted suit in Detroit - [illegible] of [illegible] days to the defendants' office. Sixty-odd days were consumed in trial work, consultations and trips to New York. Seven days were spent in attending [illegible]. The order taking to New York required him to be absent from Chicago for fifteen

days. The defendant did not undertake to deny this testimony and offered no testimony as to the value of the services rendered. The principal point of controversy is about the plaintiff's connection with the settlement of certain litigation and business affairs of the defendant not directly involved in the issues presented in the divorce proceedings. For convenience and to avoid confusion, the different matters adjusted and disposed of under the settlement agreement will be treated separately.

The Sale of Defendant's Stock in J.S. Lyon Company.

The defendant held twenty-two per cent of the stock in this company and his brother, Campbell Carrington, owned a like amount. They were both officers of the company. The defendant refused to attend any meetings at which his brother was present. The defendant took this attitude after the discovery of a so-called "Darling" letter written by his brother to Mrs. Carrington. As part of the settlement the defendant's stock was sold for the sum of $400,000.00. He and McManus testified that the plaintiff was not employed to negotiate a sale of the stock, but that this matter was handled exclusively by the New York lawyers who had been for several years attempting to make a sale.

The defendant further testified that on one occasion, in New York, the plaintiff said that he would only try the divorce case, when the record was made up and that he would have nothing to do with any settlements. The plaintiff denies this and says that from the very inception of his employment the defendant told him that the settlement of his business affairs was of paramount importance; that on several occasions

days. The defendant did not [illegible] to deny this testimony and affirm or testify as to the value of the jewelry [illegible] conferees. The principal point in controversy is [illegible] plaintiff's contention that the [illegible] of [illegible] [illegible] and payment (theirs of the defendant and [illegible] [illegible] [illegible] for correspondence and to [illegible] [illegible]. All [illegible] [illegible] adjusted and disposed of under the [illegible] [illegible] will be treated accordingly.

The Role of Defendant's Group in the [illegible]

The defendant held twenty-two out of the [illegible] in this company and his brother, Samuel Partington, owned a like amount. They were [illegible] of the [illegible]. The defendant refused to attend [illegible] at which the protest was [illegible]. The defendant [illegible] the discovery of a so-called "[illegible]" [illegible] by his brother to [illegible] Partington. In [illegible] of the [illegible] the defendant's stock was sold for [illegible] [illegible]. He and [illegible] testified that the plaintiff was not [illegible] to [illegible] sale of the stock, and that this [illegible] was handled [illegible] by the New York lawyers who had been [illegible] [illegible] to make a [illegible].

The [illegible] [illegible] [illegible] in [illegible], in New York, the plaintiff [illegible] [illegible] by the divorce [illegible], [illegible] [illegible] made no [illegible] [illegible] have [illegible] to do with [illegible]. The plaintiff [illegible] this and [illegible] that the very [illegible] of the [illegible] the defendant [illegible] [illegible] the [illegible] of his [illegible] affairs was of [illegible] importance; that [illegible] [illegible]

he discussed with the attorney for Mrs. Carrington, who was also acting for Campbell Carrington, the price which the latter would be willing to pay for the stock; that the first offer was to pay $200,000.00 which was increased by degrees until it reached the figure at which it was finally sold; that on several occasions he reported the settlement overtures of his brother's attorney to the defendant; that several times while he was in New York he conferred with the defendant and his New York lawyers about selling the stock; and that the defendant adhered to the position that the divorce case could never be settled without adjustment of his business relationship with his brother. George L. Schein, the attorney for Mrs. Carrington and Campbell Carrington says that he had a conference in New York with the defendant the plaintiff and McManus, and it was decided that they could not accomplish a settlement except by making it a complete one as to both business and domestic affairs. Schein says that the meeting was at the City Club. McManus says he attended a meeting at the same place, and that there was a talk with Schein about a settlement but that the plaintiff did not participate in it.

SNYDER v. CARRINGTON.

During the pendency of the divorce proceeding Eleanor Snyder, a daughter of Mrs. Carrington by a former marriage brought suit in the Superior Court of Cook County against the defendant. She claimed that the defendant had struck her while he was engaged in an altercation with Mrs. Carrington and claimed damages in the sum of $25,000.00. The plaintiff examined the declaration and prepared and filed a plea. As a part of the general settlement the suit was, by stipulation, dismissed without costs to either party.

in disagreement with his attorney for Mrs. Harrington, who was also acting for [illegible], the price which the latter would be willing to pay for the property; that the final offer was to pay [illegible] which was transmitted to [illegible] until it reached the [illegible]; that on several occasions he requested the [illegible] of his brother's attorney [illegible]; that [illegible] while he was in New York he [illegible] with the [illegible] and his son [illegible] about selling the [illegible]; and that the defendant [illegible] that the [illegible] with the brother. [illegible], the attorney for Mrs. Harrington and [illegible] in the first time the defendant the plaintiff [illegible]. It was [illegible] that they would not [illegible] except by [illegible]. [illegible] City Club. [illegible] place, and that there was [illegible] but that the plaintiff did not participate in it.

Snyder v. Harrington

During the pendency of the divorce proceedings Florence Snyder, a daughter of Mrs. Harrington by a former marriage brought suit in the Superior Court of Cook County against the defendant. She charged that the defendant had abused her while he was married to [illegible] Mrs. Harrington and claimed damages in the sum of [illegible]. The plaintiff [illegible] and filed a plea. As a part of the general settlement the suit was, by stipulation, dismissed without costs to either party.

THE NEW YORK PROBATION CASE.

The defendant had been placed under probation for a period of one year, by an order entered in the City Magistrate's court of the City of New York. This had been done upon the complaint of his brother, Campbell Carrington, who had charged the defendant with having assaulted him with a cane. Campbell Carrington and his attorney Sohein, in the settlement agreement, agreed to use their best efforts to obtain a vacation of the order. There is no complaint made that they failed to fulfill the promise or that they failed to succeed.

THE NEW YORK SUITS AGAINST CAMPBELL CARRINGTON.

As a part of the settlement the defendant agreed to dismiss two pending suits instituted in the State of New York against his brother, Campbell Carrington, one charging alienation of the affections of his wife and the other asking for an accounting.

There is much discussion in the briefs as to how a settlement happened to be effected. Apparently something developed during the trial of the cause which operated to cut the Gordian knot and thus sever the relations of the defendant with his wife and also with his brother. It may well be, as suggested in one of the briefs, that both parties had come to a realization that there was, at least, a possibility that neither the amended bill of complaint nor the amended cross-bill could be sustained. McManus, although insisting that the matter of the disposition of the defendant's interests in the Lyon Company had been exclusively handled by the New York lawyers for several years, admitted that nothing had been accomplished up to the time of the trial of the divorce case.

McManus persisted in his contention that the plaintiff had nothing to do with the settlement of any of the litigation pending in New York, yet he conceded that the plaintiff actively participated in the settlement conference, which lasted from early in the evening until two or three o'clock of the next morning; that he talked, by long distance telephone to McKenzie in New York about the proposed adjustment of the matters not directly involved in the divorce proceeding; and that he advised McKenzie that the proposed settlement be consummated. The defendant testified that the plaintiff insisted upon playing the role of a field marshall in the army. Perhaps he did. But the defendant expressed no dissatisfaction as to the results obtained and admitted that after the settlement had been effected he telegraphed his daughter that he had won a victory.

The plaintiff testified that, when the trial of the case had proceeded to a point where certain witnesses were testifying to facts indicating an act of adultery on the part of the defendant, the latter said to the plaintiff, "Do you think you can renew these negotiations for settlement?" and when the plaintiff replied, "I believe so," the defendant said, "For God's sake try it at noon." Whereupon the plaintiff told Schein that he would be glad to consider the question of settlement if the last offer was increased. Schein says that the plaintiff was the one to make the overture. The defendant denies that he suggested further negotiations for settlement and both he and McManus say that Schein was the moving party in suggesting a renewal of the negotiations.

Although the parties never came to any agreement about the amount of plaintiff's fees there is evidence that

Assuming certainty as to motivation and the litigation was nothing to do with the settlement of any of the litigation counts in the book, yet he remained with the plaintiff actively involved in the settlement negotiations, which lasted from mid-1 in the evening until one or three o'clock or more usually that he thought. By long distance telephone to Lawrence on the West Coast the president (the head of the enterprise and directly involved in the negotiations) said that he advised Wernecke that the proposed settlement be consummated. The defendant testified that the plaintiff indicated upon closing the sale of a final agreement in the case, perhaps to him. That the defendant attempted to disassociate himself to the media coalition and minimize very after the negotiations had been effected is reasonable his interest may be but was a minority.

The plaintiff testified that, when the issue of the case had presented to a point where minimal attempts were satisfying to those indicating an act of leadership on the part of the defendant, the latter said to the plaintiff, "We can hold you for years these negotiations for settlements" and "the plaintiff replied, "I believe so," the defendant said, "for years before you is at hand." Considering the plaintiff said should just be could to plan to consider the quantity of settlement if the case after was successful. Though says that the plaintiff was the one to make the overtures. The defendant denies that he suggested further negotiations for settlement but does in yet believe any that plaintiff was the person party in suggesting a renewal of the negotiations.

Although the initial score came at any agreement about the amount of plaintiff's fees there is evidence that

certain figures were discussed both before and after the trial. The plaintiff testified that, prior to the trial, he advised the defendant that he would not do the trial work for less than $5,000.00 and the defendant made no reply. Madden gave testimony to the same effect. The defendant denied that any such conversation took place. The plaintiff further testified that about three months after the entry of the decree he told the defendant that his fee would be $15,000.00 and that the defendant said that he considered the figure to be a little high. The defendant says that he told the plaintiff that this amount was all out of bounds and preposterous.

In his affidavit of merits the defendant stated that the plaintiff's fee should not be in excess of $1,500.00. In his letter of July 8, 1927, he said that he considered $2,500.00 to be a reasonable amount. His attorneys now say that the services were not worth in excess of $3,000.00. It may be of passing interest to note that the court reporter was paid $2,100.00 for the services furnished by him.

When the parties first met, they did not, by any written or spoken words, attempt to fix, with particularity, the scope of the plaintiff's employment. The thing then uppermost in the mind of the defendant was to have competent counsel to appear in court the next morning in respone to the petition of Mrs. Carrington for large allowances of temporary alimony and solicitor's fees. What the plaintiff was thereafter authorized to do must be implied from the conduct of the parties in view of all of the facts and circumstances. Whether he was instrumental in bringing about a general settlement of all of the defendant's affairs, and, if so, whether his activities in this respect were expressly authorized, approved, or ratified,

presented questions of fact for the consideration of the jury. If they found the facts to be in accord with the plaintiff's contentions, there was ample evidence before them to warrant them in so doing.

The plaintiff, after giving a narrative of the time expended and services rendered by him, was asked by his counsel if he knew the fair, reasonable, usual and customary fee charged by lawyers at the Chicago bar for services such as he had rendered. He replied in the affirmative. A request for his opinion as to such a fee elicited the answer, "At least $15,000.00". Upon objection and motion the answer was stricken. Counsel for the defendant then said, "There is no customary charge, if your Honor please, for a case - " . At this point he was interrupted by the trial judge, who said, "Yes, I get your point on that. I think the charges are generally made by the hour or the day." This was followed up with the comment that he did not think that a lump sum could be recognized as a usual and customary fee, although it might amount to that. The court further stated that he thought that proof should be made of the usual charges for court work and office work at home and away from home. Counsel for the plaintiff then expressed his opinion that there was a customary charge for that class of service, but no customary charge for other kinds of service. The court, addressing counsel for the defendant, then said, "That is the point I think you are making." Counsel for the defendant said nothing. Perhaps he owed no duty to speak, but his silence may well have induced the court to believe that he had stated the law in accord with the contention of counsel.

presented questions of fact for the consideration of the jury. If they found the facts to be in accord with the plaintiff's contentions, there was ample evidence upon which to render a verdict in favor of the plaintiff.

The plaintiff, after giving substantial of the same expected and anticipated monetary gain, was told by his employer if he knew the job, satisfactorily, would not necessary for employer by lawyers or the attorneys for the matrimonial contract to be produced. He replied in the affirmative. Request for the citation or to such a job dictated the employer, "on Lewis Fitzgerald, upon signature and during the employer and employee." Upon the defendant then said, "There is no necessary charge, if your boss claims, for a case - - - . In this point he was interrupted by the trial judge, who said, "Yes, I see your point as to case. I think the charge was generally made in the court of the day." This was followed by the question "Do you think that a lady who will be terminated or - legal and practically free, although it might result in this." The court further stated that to charge that court should be made of the usual charges for court work and other legal work without any from that. Counsel for the plaintiff then attempted the opinion that there was a necessary charge for that given in testimony, but no necessary charge for other kinds of service. The court, addressing the counsel for the defendant, then said, "Just on the point I think you are asking." Counsel for the defendant said nothing. Perhaps he felt no duty to speak, but the judge may well have learned the court to believe that he has stated the law is agreed with the contention I command.

Thereupon the suggestions of the court were adopted and the plaintiff, over general objection, testified that the usual and customary charge for trial work in similar cases at the Chicago bar was $250.00 to $500.00 per day; that for services out of court such a fee was $30.00 to $50.00 per hour and for out-of-town services $25.00 to $50.00 per hour.

Lloyd D. Heth, a Chicago lawyer of fifteen years experience was called as an expert in behalf of the plaintiff. He was asked a hypothetical question which was identical with the bill of particulars, filed with the declaration. He was then asked if he had an opinion as to what was the usual, reasonable and customary fee for such services at the Chicago Bar. He answered that he had. Counsel for the defendant then interposed several objections. Some of them were so general that the trial court was not obliged to give them consideration. Riverton Coal Co. v. Shepherd, 207 Ill. 395. The particular objections were that:

1. The question assumed that the defendant was a financier.

2. It assumed that the plaintiff was employed to take charge of the proceedings, whereas it appeared that he was retained as one of several lawyers to assist in them.

3. It also assumed that there was a conspiracy between Mrs. Carrington and his brother to ruin the defendant financially.

4. It further assumed that the plaintiff rendered three hundred and forty-seven hours of actual service outside of court.

5. It also assumed that thirty-two witnesses testified upon the trial of the case.

The court then proceeded to comment upon the objections. His first suggestion was that the question omitted the

fact that the plaintiff was employed as associate counsel. He then stated that according to his recollection there was no evidence that thirty-two witnesses were heard on the trial. In this he was mistaken. The plaintiff testified that this number of witnesses was called.

The court further suggested that an important element omitted from the question was the length and character of the experience of the plaintiff in the practice of the law and that the correct practice in making proof of the value of attorney's fees was to show the usual and customary fee charged per diem for court and office work. On the latter point the court finally said:

> "I think, however, the most serious question is that, as I understand it, there can be no usual and customary fees charged in a lump sum for an entire service, running over four or five months," and again,
>
> "But I think it would throw no light on the subject at all, either to this jury, and certainly not to this court, for any lump sum to be given here, and for that reason I sustain the objection."

Counsel for the plaintiff said that he would like to cite law upon the proposition and defendant's counsel remained silent. Both must have known that the court was in error in his statement of the correct practice to be followed in making proof of the value of an attorney's service not of a usual or customary kind. They, however, made little, if any effort, to put the court aright.

If there could be no usual or customary aggregate or lump fee for legal services of an unusual nature, such as those enumerated in the hypothetical question, then, beyond question there could be no usual or customary per diem charge for such services. It is a direct contradiction in terms to say that

that that the identity was relative to absolutely nothing.
So then arises that interesting in its complexities there are
no failures that a strict-use standard does lead to the still,
in this be one difficulty. The is clearly possible that this
conduct of attorneys not alike.

The court further suggested that an interpret element
matter from the question was the lack of the remainder of the
arrangements of the identity to the problems of the two one
that the material provides is unlike that of the value of
attorney's fees will be that the equal the standard for charge
put time the court has with which. We be clear that the
court finally said:

> "I gather, however, the real underlying question
> is that, as I understand it, there can be no legal
> fee contingent upon obtaining in a case and for as
> strict application, standing that fact of five months,
> but that.
>
> Then, I think it would have to rest on the
> support of all, either in this jury, or reasonably
> and be this course, for the only one is to fixed here,
> and for that reason I grant the motion.'

Toward the end of the trial, this time he could like be
able the most the [illegible] and defendant's general counsel
claim. Self-interest dictate that the notes and in error in
his statement of the course therefore to be followed is rather
proof of the value of an attorney's service was of a great or
monetary kind. They, however, with light, if not error, be
not the court right.

If there could be no [illegible] or monetary [illegible] or
imply the for legal services of in common [illegible], [illegible]
generated in the [illegible] [illegible], [illegible] [illegible]
there [illegible] be of [illegible] of [illegible] [illegible] for [illegible]
services. It is a [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

there can be a usual or customary charge per diem or hour for services of an unusual character.

The question was amended, in the presence of the jury, to conform to the suggestions and rulings of the court. The objections of the defendant, previously made, were renewed. Counsel made the specific objection "that there is no such thing as the question put to the witness now as a usual and customary charge, in those words, in the Chicago bar for the particular services in any particular case."

The witness gave as his opinion that the usual, customary and reasonable charge for trial work of the character specified in the question was $250.00 per day. For the office work he considered $25.00 per hour to be a proper charge and $50.00 per hour for office work at nights or on Sundays. He thought $300.00 per day would be a proper allowance for the time spent on the three trips to New York. This testimony was all received over objection.

Elmer M. Leesman testified that he had practiced law at the Chicago bar continuously since 1909; that he had read the hypothetical question put to the witness Heth and that he was familiar with its contents. Objections were interposed on behalf of the defendant, one being that, "There is no such thing as a usual and customary charge for services in any particular case at the Chicago bar. It is an improper question."

"Now, as I understand the rule, anything an expert can testify to, if he knows, is the usual and customary charges per day in a certain class of litigation that has been permitted." The court then said:

"I understand Mr. Healy's question practically states that. That is, in cases of this character. That is, the class of cases."

The reply of counsel for defendant was:

"I would like to have my objection to the question stand."

The witness answered, giving substantially the same figures as those given by the witness Heth.

The same question, with additional assumed facts as to the plaintiff's experience as a lawyer, and the elimination of the assumption that the defendant's stock in J.S. Lyon Company was worth $200,000.00 in December, 1926, was asked of two other attorneys. One of them, John P. Barnes, gave as his opinion that the usual customary and reasonable charge in Chicago for similar services was $300.00 per day for trial work and the same amount for work out of court. He considered that for work after business hours and while in New York the plaintiff should receive from twenty-five to thirty per cent more.

Schein, who was the attorney for Mrs. Carrington and Campbell Carrington, in answer to the same question fixed the usual and customary fee for services in trial work of a similar nature at $400.00 or $500.00 per day, $200.00 to $250.00 for services rendered out of court during regular hours and $50.00 per hour for work at nights and on Sundays.

It is contended on behalf of the defendant that many things were included in the assumption of facts contained in the hypothetical question which were not supported by any evidence

"I understand Mr. Hardy's question is practically as to that. That is, in case of this character. That is the case of water.

The judge of course for instance was:

"I would like to have my objection to the question stand."

The witness answered, giving substantially the same figures as those given by the plaintiff here.

The same question, with additional searched lists as to the plaintiff's mineralogy in Colorado, and the distribution of the assumption that the plaintiff's stock in U.S. Lead Company was worth [illegible], on December, 1910, the value of ten cents [illegible]. He or else, Lucas C. Adams, gave as his opinion that the stock portrayed [illegible] charge in shipments for yielding [illegible] per day for [illegible] work and the same amount for work out of [illegible]. He considered that for work [illegible] work and while in the [illegible] plaintiff should receive [illegible] in thirty per [illegible]

Adams, who was the attorney for [illegible], [illegible] Farwell [illegible], in answer to the same question fixed the [illegible] and maximum for [illegible] in [illegible] of a [illegible] mature [illegible] for [illegible] [illegible] for services rendered out of [illegible] [illegible] per hour for work in [illegible] and [illegible].

It is contended on behalf of the defendant that [illegible] mines were included in the [illegible] of the [illegible] in the [illegible] [illegible] not [illegible] by any evidence

or were of such a prejudicial nature as to warrant this court in holding that the amount of fees allowed by the verdict and judgment was excessive. When the question was put to the first two expert witnesses it contained an assumption that the defendant in December, 1926 valued his stock holdings in J. B. Lyon Company at $200,000.00. Upon objection being pressed for a ruling by the court this item was eliminated from the question when asked of the other experts. There was no evidence that the defendant valued the stock at that figure but the plaintiff did testify that the defendant said that $200,000.00 was its book value. The defendant testified before the court on the first hearing on the petition for temporary alimony and solicitor's fees that the stock was worth $300,000.00 if he could get that amount for it. It is said that the question, before it was amended as above indicated, tended to give the jury the impression that the plaintiff had realized a profit of $200,000.00 from the sale of his stock and that, with the amendment made, it became a mere matter of speculation, as to what, if any, profit was realized. Counsel say that the question as originally framed assumed facts sufficient to raise the inference that the defendant was a financier. This element was immediately eliminated. In addition to this, the defendant on cross-examination was, without objection disclosed by the abstract, asked if he was a financier. He answered that it depended on what constitutes a financier and that he did not know whether he was one or not. Finally he suggested that the question be left to the jury.

It is argued that these matters had the effect of tending to lead the jury to believe that the defendant was a man of great wealth and for that reason should be required to

or any of such a statement, which is to assert that least in holding that the owner of the chattel is not entitled to the property was a fraudulent. Then the question is, was the first two words statement if considered as something just the letter to Jackson, that making the jury believe to . . . upon payment of $100,000. Upon objection being sustained the a ruling by the court that the defendant had the right to own money owner of the other property. Then was on statement that the defendant stated to state to that letter and the statement did verily that the defendant said that $100,000.00 was the book value. The defendant contended that the result on the first hearing of the petition for temporary injunction satisfactorily been that the owner was worth $100,000.00 if he could get that amount for it. It is said that the question, before it was answered by counsel (plaintiff), tended to give the jury the impression that the plaintiff had realized a profit of $100,000.00 from the sale of the property and that, with the additional gain, it became a mere matter of speculation, as to when, if ever, profit was realized. Counsel say that the general impression thus created from reflections to value was indicative that the defendant has a financial, this element was immediately eliminated. In addition to this, the defendant on cross-examination was, without objection, interrogated by the court asked if he was a financier. To answer that it demanded an that constituted a financier and that he did not care whether he was one or not. Finally he suggested that the question be left to the jury.

It is argued that these matters had the effect of leading to lead the jury to believe that the defendant was a man of great wealth and that that reason should be resented to

pay excessive fees. The facts as to the terms of the settlement and the conversation of the parties were before the jury, and properly so. In fact no complaint is made on this score. These facts were competent, not for the purpose of showing profits as though the plaintiff was entitled to recover upon a commission basis, but to show the extent and importance of the interests involved.

The correct rule appears to be that a party litigant, where the facts are controverted, may incorporate in a hypothetical question, within the limits of the testimony, any state of facts which he may fairly contend are supported by the evidence. The defects, if any, in the question may be supplied by questions asked upon cross-examination. Chicago City Ry. Co. v. Bundy, 210 Ill. 39. In that case the court said:

> "Objection is also made to some of the hypothetical questions put to physicians who testified on behalf of appellee. These objections, made in the trial court, were not sufficiently specific to sustain the special objection here sought to be raised. In other words, the attempt is to raise a specific objection for the first time in this court. Counsel have a right to assume, within the limits of the testimony, any state of facts which they claim to be justified by the evidence, and to have the opinions of experts upon the facts so assumed, The question may embrace such facts as are claimed to be established by the evidence, and if the other side does not think all of the relevant facts are included in such questions it may include them in questions propounded on cross-examination."

Again in the case of The People v. Geary, 297 Ill. 608, the Supreme Court stated the rule as follows:

> "A party is not bound to assume the existence of a fact concerning which testimony has been given if the fact is controverted and to be submitted to the jury for determination but may select such facts as he claims to exist, and the jury are to determine whether they have been proved. To require a party to submit a hypothetical question assuming facts which he does not admit

pay expensive fees. The facts as to the terms of the settlement and the contribution of the parties were before the jury, and properly so. In fact no complaint is made on this score. These facts were admitted, not for the purpose of showing profits as though the plaintiff was entitled to recover upon a commission basis, but to show the extent and importance of the interests involved.

The correct rule appears to be that a party litigant, where the facts are controverted, may incorporate in a hypothetical question, within the limits of the testimony, any state of facts which he may fairly contend are supported by the evidence. The remedy, if any, to the question may be supplied by questions under cross-examination. [illegible] v. Duke, 149 Ill. 786. In that case the court said:

> "Objection is also made to some of the hypothetical questions put to physicians who testified on behalf of appellee. These objections, made in the trial court, were not sufficiently specific to identify the special objection here sought to be raised. In other words, the attempt is to raise a specific objection for the first time in this court. Counsel have a right to assume, within the limits of the testimony, any state of facts which they claim to be justified by the evidence, and to have the opinions of experts upon the facts so assumed. The question may assume such facts as are claimed to be established by the evidence, and if the other side deems that all of the relevant facts are not included in such questions it may include them in questions propounded on cross-examination."

Again in the case of [illegible] v. [illegible], 207 Ill. 240, the Supreme Court stated the rule as follows:

> "A party is not bound to assume the existence of a fact concerning which testimony has been given if the fact is controverted and is to be submitted to the jury for determination but may select such facts as he claims to exist, and the jury are to determine whether they have been proved. If counsel for a party may submit a hypothetical question embodying facts claimed to have been their

> but which are in dispute would compel the court to usurp the functions of the jury. (Howard v. People, 185 Ill. 552.) If the evidence is in conflict the hypothetical question may, and should, embrace only the facts tending to support the claim of the party proposing the question, but a question which fails to include all the facts as claimed and proved by the party himself would only tend to mislead the jury by causing them to adopt an opinion without regard to the facts on which it is based."

The opinion in the case further discloses that the hypothetical question there involved was propounded by the defendant. The court affirmed the trial court in sustaining an objection to the question, giving as a reason therefor that the question did not contain all of the essential facts proved by the party asking the question.

What weight the expert witnesses gave to the supposed objectionable elements contained in the hypothetical question, in expressing their opinions, did not concern the jury. Counsel for the plaintiff had the right to assume in the question all of the facts, which the evidence fairly tended to support, that he considered essential or proper in getting before the witnesses the facts material in presenting his theory or version of the issues. It was for the witnesses to determine what facts were pertinent in aiding them to form an opinion. It was for the jury to determine whether the evidence established the assumed facts and what, if any weight should be given to the opinions of the witnesses.

The jury were instructed, at the instance of the defendant, that, in determining the fair and reasonable compensation to be allowed to the plaintiff, they should not consider the defendant's income or property and that his financial condition was not material and all reference thereto in the evidence or in the remarks of counsel should be disregarded.

> and which are in dispute would compel the court to usurp the functions of the jury. (Forsyth v. Doolittle, 120 U.S. 73.) If the evidence is in conflict the hypothetical question may, and should, embrace only the facts tending to support the theory of the party propounding the question, but a question which fails to include all the facts in evidence favorable to the party against it would only tend to mislead the jury by causing them to adopt an opinion without regard to the facts on which it is based."

The evidence in the main record discloses that the hypothetical question there involved was propounded by the defendant. The court affirmed the trial court in sustaining an objection to the question, although it was claimed that the question did not contain all of the material facts relied by the party asking the question.

That points the expert witnesses gave to the essential disputed elements contained in the hypothetical question, in expressing their opinions, did not mislead the jury. Counsel for the plaintiffs had the right to embrace in the question all of the facts, which the evidence fairly tended to support, that he considered necessary or proper in getting before the witnesses the facts material in determining the nature or extent of the injury. If any fact the witnesses so assumed as a fact there were [illegible] in stating them by [illegible], it was for the jury to determine whether the evidence established the assumed facts and what, if any, weight should be given to the opinions of the witnesses.

The jury were instructed [illegible] the liability of the defendants, that, in determining the sum which plaintiff was entitled to recover, they should not consider the defendant's income or property and that the financial condition of any defendant was not material, and that no [illegible] in the evidence as to the amount of damages should be disregarded.

The defendant, a lawyer, indicated his willingness to have the jury pass on the question whether he was a financier by occupation as well as a lawyer by profession. In this connection, and apparently without objection, he testified that he was principally engaged as a lawyer in corporation work in New York and Chicago in large matters, sometimes running into millions of dollars. The remainder of the facts as to his financial condition were incidentally developed in connection with proof of the price received for his stock in J. S. Lyon Company as a result of the settlement. Considering all of the evidence, the issues involved, and the instructions given by the court, it appears that no prejudicial harm resulted to the defendant by the assumptions in the hypothetical question concerning his financial worth.

One of the objections to the question put to the expert witnesses was that it contained the assumption that Mrs. Carrington and Campbell Carrington had entered into a conspiracy to ruin the defendant financially. The plaintiff testified that the defendant told him at the very outset that his brother was trying to accomplish his financial ruin through Mrs. Carrington. The wife and his brother were both represented by the same attorney. She wanted a large alimony allowance and he desired to force the defendant to release his holdings of stock at a low figure. There may not have been a conspiracy within the technical meaning of the word as used in legal proceedings, but it does not appear that the jury could have been misled or prejudiced because the question characterized the concerted plan and action of Mrs. Carrington and the defendant's brother as a conspiracy.

There is no denial that the plaintiff was employed to render legal services, that he performed such services, and that he is entitled to reasonable compensation as his reward. All of the contentions made on behalf of the defendant are advanced in support of the sole purpose of demonstrating that the allowance for fees made by the jury and approved by the court is excessive. One point strenuously urged is that the court misconceived the proper practice to be pursued in proving the value of legal services of an unusual nature. Counsel for the plaintiff, in effect, concede this, but say the error was provoked by the conduct of counsel for the defendant and that therefore the defendant cannot be heard in this court to complain of a self-inflicted wrong suffered in the trial court. On behalf of the defendant it is contended that the ruling of the court was highly prejudicial because undue stress was given to the element of time. Plaintiff's counsel reply that the matter of the time expended was necessary to be considered as an important factor in determining the value of the services rendered.

On this point both sides seek consolation in the case of L., N. A. & C. Ry. Co. v. Wallace, 136 Ill. 87. In that case the Supreme Court of this State, speaking through Mr. Justice Magruder, said:

> "Where the professional service is of such a character, that it has become usual and customary to make a certain charge for its performance, evidence should be given of the amount of such usual and customary charge. What is a usual and customary charge for a particular service is a question of fact; and, where a witness states what it is, even though he has learned it from his professional experience, he is testifying to a matter of fact, and not altogether as an expert. But, as to much of the legal work which is done for their clients by attorneys at law, there is no customary or established

There is no doubt that the jurisdiction was obligated to render legal services, but on authority and principle, and that he is entitled to reasonable compensation in the record. All of the assignments are on behalf of the defendant who alleges in substance that the trial judge and jury and counsel by the court is excessive. The gist substantial ground is that the court misconceived the proper practice to be followed in proving the value of legal services of a kind rendered in suit. Counsel for the plaintiff, in effect, concede this, but as the error was invoked by the conduct of counsel for the defendant and not from inserts the defendant's claim is held in this court to constitute a sufficiently strong motive in the trial court. On behalf of the defendant it is contended that the ruling of the court was highly conjectural because which effect was given to the element of time. Naturally counsel point that the matter of the time devoted was necessary to be considered as an important factor in determining the value of the services rendered.

On this point both sides seek consideration in the case of Mc. L. & T. Co. v. Lanier, 114 Ga. 67. In that case the further part of this text, quoting through -, Court Syllabus, said:

> "Where the professional service is of such a character, that it can be proved and measured in dollars, a certain charge for its performance, evidence which is given of the amount of such usual and customary charge, and is a fair and necessary criterion for the particular service in question, when there is no other evidence, when taken by the learned jury from the professional experience, or in testimony in a matter of fact, and not a question of opinion. But, as in such of the legal work which is done the trial attorney or attorneys at law, there is no customary or established

charge, especially where, as in this State, legal fees, except in amicable partition suits, are not the subject of statutory taxation. The value of legal services will often times depend upon a variety of considerations, such as the skill and standing of the person employed, the nature of the controversy, the character of the questions at issue, the amount or importance of the subject-matter of the suit, the degree of responsibility involved in the management of the cause, the time and labor bestowed. For such services there can be no established market price. There is no fixed standard by which their value can be determined. They manifestly come within the many exceptions to the general rule, that the opinions of witnesses are not evidence. (1 Greenl. on Ev. sec. 440). What is a fair and reasonable compensation for the professional services of a lawyer cannot, in many, if not in most cases, be otherwise ascertained than by the opinions of members of the bar, who have become familiar, by experience and practice, with the character of such services. 'Practicing lawyers occupy the position of experts as to questions of this nature.' (Allis v. Day, 14 Minn. 516)."

See also, Maneaty v. Steele, 112 Ill. App. 19, where the same rule was applied.

No case has been called to our attention in which there was a departure from the rule pronounced and applied in these cases. Counsel for the plaintiff should have asked the expert witnesses for their opinions as to the reasonabbe value of the services assumed in the hypothetical question to have been performed by the plaintiff. This he did not do. The court repeatedly ruled that the correct and only recognized practice was to submit proof of the usual, customary and reasonable fees per diem for legal services rendered in court and out of court. Counsel for the plaintiff indicated of record his desire to present authorities that opinions as to a reasonable aggregate fee were competent but, nevertheless, acquiesced in the ruling of the court. Two questions arise. One is whether the error of the trial court was of such a serious nature as to ordinarily warrant a reversal of its judgment. The other is whether counsel for the defendant provoked the error or by

his conduct led the trial judge to believe that he was following the practice advocated by counsel.

In their reply brief counsel for the defendant say:

> "It is perfectly clear that the expert witnesses had some lump sum in their minds and divided that by the number of days and hours that appellee (plaintiff) claimed to have worked, and thus arrived at the rate per day and per hour."

If this be true, then their opinions were based upon a solid foundation under the rule laid down in L., N.A. & C. Ry Co. v. Wallace, supra, and the defendant suffered no harm by virtue of the court's erroneous ruling. An examination of the testimony of the witnesses, adduced upon cross-examination, shows that there is strong support for counsel's deduction.

We have above, in connection with the consideration of the opinions of the witnesses testifying as to the value of plaintiff's services, set out the controlling facts pertinent to the determination of the responsibility of defendant's counsel for the ruling in question. The objection was repeatedly made that there was no usual or customary charge for legal services rendered in any particular case. But, at no time during the trial of the case, did counsel advise the court that the objection was based upon the fact that the services rendered were of such an unusual nature that there could be no usual or customary charge or that in such cases it was proper to permit the witnesses to give their opinions as to a reasonable lump fee. Now they say in this court that,

> "The opinions of the expert witnesses as to the proper lump sum allowance for all the services rendered by Koenig should have been allowed to go to the jury."

But, when the trial judge on several occasions stated a rule of practice to the contrary, counsel stood mute. Several times the court stated that he understood the views of counsel and then proceeded to restate and elaborate upon them, in his own language. Counsel made no attempt to advise the court that he was in error. The experts were cross-examined at length but no questions were asked them which would call for their opinions as to what was a reasonable lump sum charge for plaintiff's services. No instruction was tendered on behalf of the defendant which would advise the jury of the proper method to be adopted in determining the amount of the fees. The record is wholly free from any suggestion to the court by counsel for either litigant of the applicability of the rule laid down in L., N. A. & C. Ry. Co. v. Wallace, supra.

At the instance of the plaintiff, the jury were instructed that the opinions of the attorneys as to the "fair, usual, reasonable and customary compensation for such services" as the evidence disclosed were competent for their consideration and that in arriving at the amount of fees to be allowed it was proper for them to consider what was the "fair, usual, reasonable and customary charges of attorneys at the Chicago Bar for similar services." There is no complaint made in the briefs of the action of the court in so instructing the jury. At the request of the defendant the jury were instructed that they were not bound by the opinions of the experts and that they might even wholly disregard them if they were of the opinion that they were unreasonable in view of all of the facts and circumstances in evidence.

In the case of Drainage Commissioners v. Drainage Commissioners 211 Ill. 328, the Supreme Court of this State held that where a party insists upon a certain line of action by the trial court he cannot be heard upon appeal to say that the court erred in adopting his views. The court in its opinion said:

> "It is next contended that the court erred in permitting the witnesses of appellee to state the amount of benefits, in gross, received by appellant from the enlargement and extension of said main ditch and outlet. The theory of appellee was, that appellant having connected its ditches with said enlarged ditch or outlet, it should pay such proportion of the cost of the construction thereof as the benefits to the lands lying exclusively in its district and outside of the lands lying in both districts bear to the entire cost of the construction of said enlarged ditch or outlet, and sought upon the trial to prove the benefits which would accrue to each tract of land lying exclusively in district No. 3. To this method of proof the appellant objected, and insisted the witnesses should be required to state the benefits in a gross sum which the appellant, as a district, would receive by the construction of said main ditch or outlet as enlarged if its ditches were connected therewith. The trial court agreed with appellant and adopted its view, and appellee thereupon interrogated its witnesses in accordance with the view insisted upon by appellant and adopted by the court. The appellant having insisted upon that view upon the trial and having procured a ruling from the court in accordance with its view, cannot now insist that the action of the court in that particular was wrong, but is bound by the action of the trial court in that regard."

We think the rule there adopted is applicable to the instant case. It may be true that counsel for the defendant did not expressly insist that the trial judge rule as he did, but the same result followed from his silence when the court, several times, expressed himself as adopting counsel's views as to the proper practice.

It is contended that the first instruction given at the request of the plaintiff was erroneous because it did not tell the jury that the test of the proper compensation for an attorney's services is the amount that would be reasonably agreed

upon for such services between parties competent to contract. The point is not supported by the authorities cited. The cases, referred to, hold that the question is not what is reasonable, just and proper for the attorney in the particular case, but what is the usual charge between parties competent to contract. Where there is no express agreement between attorney and client there arises an implied obligation to pay for legal services rendered. If the services are of such a nature that there is a usual or customary charge for the doing of them then the implied obligation is to pay such usual or customary.charge. If the work is of such an unusual nature that it cannot be said that there is any usual or customary fee, then the client becomes bound to pay a reasonable compensation according to the value of the services rendered. It goes without saying that if there is a usual and customary fee it must be one usual and customary between parties competent to contract. Fees paid or contracted for by incompetents would, of course, furnish no criterion. We feel quite certain that neither the experts nor the jury in considering the amount of the fees gave any consideration to transactions between parties where either one was incompetent to enter into a binding contract.

Complaint is also made of the second instruction given at the instance of the plaintiff that the jury would easily receive the impression that the plaintiff was entitled to receive compensation for benefits resulting to his client by virtue of services rendered by the defendant's New York lawyers. The instruction is not susceptible of such a construction and the jury could not have been misled in the manner suggested.

open for such matters unless written instruments to satisfy the point if not incorporated in the contract itself. The plaintiff, relying on, said that the decision is not just in accordance, just and proper in the circumstances in the particular case, but what is the usual course between parties contracting to contract. There there is no express contract between attorney and client there always is implied obligation to pay for legal services rendered. If the client has by or made a promise that there is a fund in existence or that for this thing of that then he thinks entitling it to pay such sums or contingency charges. If the case is of some or contract matter that it cannot be said that there is any sums or contingency fee, then the client benefit or by a reasonable remuneration according to the value of the services rendered. If case without right then if there is a fund and necessary for it must be the usual and reasonably contingency to contract. Then said or contracted for by interpretation would, of course, lessen to attitude. It had also lately that notice the argument for the jury in calculating the amount of the fees pay any contingency or circumstances attorney parties where either one not interested in order into a binding contract.

Consulted is also made of the second instruction given at the instance of the plaintiff that the jury must weigh the interest that the plaintiff was entitled to receive contingency for benefits resulting to the client by virtue of services rendered by the defendants for that purpose. The instruction is not unconstitutional such a construction and the jury could not have been misled in the manner suggested.

We are not impressed with the contention that the lack of experience on the part of the plaintiff demonstrates that an excessive fee was allowed. He was admitted to the bar of this state in 1916. While it does not appear that he had tried any case of great importance, it did appear that as clerk or otherwise he had been associated with lawyers of high standing and long experience at the Chicago bar. There is no complaint about the character of the services rendered and the defendant at the conclusion of the divorce case proclaimed that he had won a one-hundred per cent victory. It has been our observation that many young lawyers, acting in the subservient capacity of law clerks, have in a few years time acquired skill and a knowledge of the law sufficient to make them worthy of the steel of the average veteran lawyer.

It is also urged that the fees received by Madden and Schein bear further evidence supporting the contention that the jury awarded an excessive fee. This contention is also untenable. Madden was paid $1,000.00. He testified that he considered that he was entitled to at least $3,000.00, but accepted what he got. At the time he testified he still represented the defendant in several matters and had been expressly warned by him not to play the role of peacemaker because it was a dangerous one. The court allowed Schein $3,000.00. This sum came out of the pocket of the defendant. What Mrs. Carrington paid, in addition, out of the $25,000.00 she received was not disclosed. The trial court refused to permit any inquiry into that subject.

The allowance made by the jury and confirmed by the trial court was liberal. If the jury found that the plaintiff was not entitled to any compensation for services rendered in effecting or substantially aiding in the effecting of the general settlement, the amount allowed would appear to be excessive. If, however, they found that he was entitled to remuneration because of his activities in bringing about the settlement, we reach a different conclusion. This was an issue to be determined by the jury.

We are of the opinion that the rulings of the trial court, under all of the circumstances, were not of such a prejudicial nature as to warrant a reversal of the judgment.

For the foregoing reasons the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

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32984

ESTHER JOY,

Plaintiff - Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2521.A.636

Opinion filed Feb. 27, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

Esther Joy, plaintiff, brought a suit against the City of Chicago for personal injuries sustained by reason of a fall while walking upon South Ashland Avenue in the City of Chicago, on or about October 14, 1923. The action was based upon the negligence of defendant, City of Chicago, by reason of its failure to keep and maintain a sidewalk at the place where the accident happened in a reasonably safe condition for the use of the plaintiff and the public generally. The trial resulted in a verdict in favor of the plaintiff for the sum of $15,000.00, and judgment was entered upon the verdict, from which judgment this appeal is perfected.

The defendant has argued three grounds for reversal: First, that the notice served upon the City did not contain the names of two physicians who attended the plaintiff at or about the time of the injury and shortly thereafter; second, that the plaintiff was guilty of contributory negligence and that there was no evidence in the record showing that the defendant was guilty of negligence; third, that the damages are excessive.

Opinion filed Feb. 27, 1923

The facts in the case show that the plaintiff on or about the 14th day of October, 1923, was walking over and upon the sidewalk on South Ashland avenue, near the premises known as number 6532, between the hours of 8 and 9 o'clock in the evening; that she was returning from a drug store located upon said street to her home at the time of the accident. It was dark and she was carrying a pan of ice in her hand and tripped over a protuberance or projection in the sidewalk. It appears that the plaintiff was proceeding along this sidewalk up to the point in question where there was a sudden, sharp, well-accentuated rise in the sidewalk by reason of the fact that it was not properly joined together at that point, creating a sudden sharp rise of two or three inches, well defined, as shown by the photographs attached and made exhibits in the case. There is testimony to the effect that the lights were poor and that the plaintiff had not been over this particular stretch prior to the accident. The plaintiff tripped over the sidewalk at this particular point and was assisted to her home by Fred Goodheim, a witness in the case, she summoned Dr. Holmes, who testified that he saw her on or about October 15, and found a swelling extending over the knee to the foot and that the leg was red, and the patient complaining of pain. He testified that he treated her until on or about October 27th, and kept the limb elevated by keeping it on a chair alongside of the couch on which she was resting and administered aspirin to relieve the pain.

Dr. O'Connor, a witness called on behalf of the plaintiff, testified that on or about October 18, 1923, he made an examination of the plaintiff and found the left knee much swollen and discolored and painful on movement and treated

her for about two weeks, during which time he had her at the Mercy Hospital for observation.

Dr. Black, called as a witness on behalf of the plaintiff, testified that the first time he saw the plaintiff, she was at her home and he treated her during January and until about the 19th of February, 1924. He testified further that he found a contraction of the leg backward at a rather acute angle, that she was suffering continuous pain and that he administered ether for the purpose of causing relaxation of the limb and placed it in a cast, where it was kept for about 14 days and then massaged. That while she was under the influence of the anaesthetic he straightened the limb and manipulated the joint and had her under his care and saw her continuously during the time that he treated her.

Plaintiff testified that the pain was constant for the next two years following the accident and that she massaged it daily and could only get around on crutches; that she then called in Drs. Levinthal and Jacobs who began a course of treatments; that the leg was ankylosed and at an angle of from 50 to 60 degrees. A slight swelling was in evidence at the time of the trial as well as the ankylosed condition. She had to take sedatives to relieve the pain.

Dr. Adams testified on behalf of the plaintiff that the knee was nearly ankylosed, with slight motion, and that the articular end of the thigh bone had been removed as well as the articular end or joint surface of the tibia, resulting in a shortening of approximately one inch of the leg and that there was a wasting of the calf and some of the thigh muscles.

On January 25, 1934, a certain notice was filed with the proper officials of the City of Chicago, stating the place and the time of the injury and giving the name of the attending physician as Dr. Jery E. Black, 6355 South Ashland Avenue, Chicago, Illinois. It appears from the evidence that at the time of the filing of this notice Dr. Black was, in fact, the attending physician and had been for several days prior thereto and continued to be for many days thereafter. The names of Dr. O'Connor and Dr. Holmes were not contained in the notice and it is insisted that the failure to include the names of these two physicians, who had attended the plaintiff prior to the time of the giving of the notice, was not a compliance with the statute.

Chapter 70, Par. 7, Cahill's Ill. Stats., provides as follows:

> "Par. 7. NOTICE OF SUIT TO BE FILED WITHIN SIX MONTHS.) § 2. Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place or location where such accident occurred, and the name and address of the attending physician (if any). * * * "

It is evident that this section of the Injuries Act is a statute of limitations and that the provision in regard to the filing of notice is in derogation of the common law and therefore its meaning should not be extended. At the time of the

serving of the notice in question, Dr. Black, whose name is contained in the notice, was the attending physician. It is true that the other two physicians had attended the plaintiff prior to the serving of the notice, but were not in attendance upon the plaintiff at the time that the notice was given and we see no reason for extending the meaning of the statute so as to include them within its scope and intention. The purpose of the requiring of the serving of notice, as provided for in the statute, was to enable the city or municipality to have an early opportunity of investigating the facts surrounding the accident, as well as the facts concerning the condition of the party claimed to be injured. With the name of the attending physician in its possession, and with reasonable diligence, the defendant could without difficulty have ascertained and discovered the medical history of the case, including the names of previous attending physicians. The Supreme Court of this State in commenting upon this section of the Injuries Act in the case of McComb v. City of Chicago, 263 Ill. 510, in its opinion says:

> "It will be observed the notice stated the injury received by plaintiff was 'at or near the corner of Thirty-ninth street and Campbell avenue,' It does not specifically state which corner, and appellant insists the notice is too uncertain and indefinite as to the place of the accident to be a substantial compliance with the statute. It must be admitted that in this respect the notice was crudely and carelessly prepared, but if, considering the whole notice together, it gives sufficient information to the city authorities to enable them, by the exercise of reasonable intelligence and diligence, to locate the place of the injury and ascertain the conditions alleged to have existed which caused it, it is sufficient, according to the weight of the authorities, to serve the purpose for which it was required by the statute to be given. No particular form of notice is required by the statute. Statutes similar to ours are in force in many States of the Union, and the sufficiency of notices given under such statutes as to the place of the injury has frequently been passed upon by

setting of the alert in question, or, [illegible], which had to contained in the notice, not the [illegible] provision. It is true that the other two decisions and [illegible] the [illegible] prior to the serving of the notice, but [illegible] upon the plaintiff at the time [illegible] [illegible] as to include them within its scope and [illegible]. The [illegible] of the remaining of the [illegible] of [illegible] for [illegible] the statute, was to [illegible] the city or [illegible] to [illegible] a [illegible] operation of [illegible] the [illegible] the accident, as well as the facts [illegible] the [illegible] of the party alleged to be injured. With the [illegible] of the attending physician in its possession, and with reasonable diligence, the claimant could [illegible] [illegible] have ascertained and discovered the medical history of the case, including the cause of previous [illegible] operations. The Supreme Court of this [illegible] is to [illegible] upon this question of the implies [illegible] in the case of [illegible] v. City of [illegible], 163 Ill. App. 3d, as the [illegible] says:

"It will be observed the notice stated the injury received by plaintiff was 'at or near the corner of Twenty-ninth street and [illegible] avenue.' It does not specifically state which corner, and [illegible] [illegible] the notice is the material [illegible] [illegible] place of the injury to be a [illegible] [illegible] with the statute. It must be admitted that in this respect the notice was [illegible] and [illegible] [illegible], but it, considering the whole notice together, is [illegible] sufficient information to the city [illegible] to enable them, by the exercise of reasonable intelligence and diligence, to locate the place of the injury and ascertain the circumstances alleged to have caused it. It is sufficient, according to the weight of the evidence, to serve the purpose for which it was required by the statute so to [illegible]. The jurisdiction [illegible] of notice is regulated by the statute. Courts [illegible] to [illegible] are in force in many [illegible] of the Union, and the multiplicity of notices given under such statutes as to the place of the injury has frequently been passed upon by

the courts of other States. In Ellis v. City of Seattle, 92 Pac. Rep. 431, the notice stated the injury occurred by plaintiff driving in a hole on the west side of a street. The proof showed the hole was on the east side of the street. The street was forty-six feet wide, and the officials of the city testified they had no knowledge of any defective condition of the east side of the street at the time of the injury. The court held the requirements of the notice should receive a liberal construction; that the purpose of it was to enable the officers of the city to locate the place of the injury with a view of preparing a defense if it was thought a defense should be made, and that if the notice directed the attention of the officers with reasonable certainty to the place of the accident the requirements of the statute were met. The court said: 'It was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants.' "

Our attention is directed by counsel for the defendant to the case of Cole v. City of East St. Louis, 158 Ill. App. 494, but we find nothing therein contained in conflict with our interpretation of this statute. The court in its opinion in that case expressly said:

> "The statute only requires the notice to contain the name of the attending physician at the time the notice was served."

Counsel also relies upon the case of Graham v. City of Rockford, 338 Ill. 214, but the court does not in that case directly pass upon this question, and it was not before it for decision.

Moreover, an examination of the record discloses no objection was made to either of the two medical witnesses, Drs. O'Connor and Holmes, when they were called as witnesses for the plaintiff, and the objection to the notice itself appears to have been based on the sufficiency of the proof of the facts set forth in the notice and that it, the notice, was not properly and sufficiently set forth in the declaration.

This last objection was passed upon by this court on appeal by the defendant from a judgment of the trial court sustaining a demurrer to the declaration and found in the case of Joy v. City of Chicago, 243 Ill. App. 610. In that case it was held that the allegations contained in the declaration in regard to the notice were sufficient. We find in the record no direct objection to the notice on the ground that it failed to contain the names of the two physicians who had previously attended the plaintiff.

Under the construction which we have placed upon this particular section of the Injuries Act in regard to the notice required to be served upon the city, it was not incumbent upon the plaintiff to give the names of any physician other than the one attending her at the time of the giving of the notice.

From our examination of the evidence we find no contributory negligence on the part of the plaintiff and we further find that there was ample evidence to sustain the verdict of the jury and the judgment of the trial court.

The history of the injury, from the time of the accident to the day of the trial, indicates a permanent impairment of the use of the leg. It may be that the present condition was aggravated by the fact that there were streptococcic germs laden with infection contained in the body of the plaintiff, and that the condition of the plaintiff was not solely attributable to the accident, but, it is a well known fact that in the case of trauma, such germs will attack

the injured part and cause serious complications. Without the injury they may have lain dormant and remained neutral. There was sufficient evidence upon which the jury could arrive at the opinion that the present condition of the plaintiff was the direct result of the injury; or, in other words, that the injury was the direct cause of her present condition. An examination of the medical history of the case, as shown by the evidence, leads to the opinion that the damages were not excessive.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND HYNES, J. CONCUR.

126a

33016

ANTON M. BUTCHAS,

Appellant,

v.

FRANK L. SAVICKAS,

Defendant.

METROPOLITAN STATE BANK, a Corporation, Garnishee,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

252 I.A. 636

Opinion filed Feb. 27, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff Anton M. Butchas, obtained a judgment by confession against Frank L. Savickas, defendant, for $1821.00 and costs, April 18, 1928. Execution upon this judgment was returned, "No property found and no part satisfied." An affidavit asking for garnishee summons against the Metropolitan State Bank, a corporation, was filed April 18, 1928, and returnable April 30, 1928. Garnishee summons issued and was returned endorsed as served on the Metropolitan State Bank by delivering a copy thereof, together with a copy of written interrogatories filed in said suit. The interrogatories referred to were on a blank form containing only the title to the cause and the interrogatories themselves were blank, so that as a matter of fact there were no interrogatories on file to be answered. The Metropolitan State Bank, by its counsel, filed its appearance and, on the return day named in the writ which was May 2, 1928, appeared and the case being called for the purpose of listing it for trial, it was, upon

motion of the garnishee, Metropolitan State Bank, dismissed for want of interrogatories and the garnishee dismissed out of the proceeding. Subsequently, a motion was made by the plaintiff to vacate the order of May 8th, discharging the garnishee, which motion was overruled. No appeal was taken from this order by the plaintiff. A subsequent motion to vacate the order of May 8th was entered on June 6, 1926, and continued to June 8th and on June 9th an additional order was entered continuing the motion to June 11th, at which time an order was entered overruling the motion of plaintiff to vacate the order of May 8th, from which last order this appeal was perfected to this court.

It is urged as a ground for reversal that under the rules of the Municipal Court, the only duty devolving upon the Judge assigned to the calling of cases upon return day, was to take defaults and enter judgments where parties were entitled thereto and that all other cases which were then at issue should be placed upon the trial calendar or set for trial, and that the court had no right nor power to entertain a motion to dismiss on the return day of the cause which, in this case, happened to fall upon May 8th. Counsel further urges that, under the rules of the Municipal Court, notice of all motions must be in writing and served upon the opposite party, stating the time and place of hearing of said motions and designating the Judge before whom the motion was to be made.

In the case at bar, there being no written interrogatories as provided by law, it was proper to dismiss the garnishee and we see no reason why this could not be done upon the return day where it was brought to the attention of the trial court

that there was nothing for the garnishee to answer and, consequently, nothing to be set for hearing. Moreover, the motion to vacate the order was heard on May 24th, and overruled. No exception appears to have been taken to this order and no bill of exceptions preserved. It necessarily follows that this court has nothing before it to show upon what evidence, written or oral, the court based its finding. The subsequent motions made by the plaintiff were not motions to vacate the order of May 24th, but were motions to vacate the order of May 8th, which had already been passed upon. It necessarily follows that the court having heard and considered the motion on May 24th, was not again required to consider it on June 11th. If the motion of June 11th had been a motion to vacate the order of May 24th, denying the motion to vacate the order of May 8th, it might have considered such a motion upon a proper showing to the effect that there were additional facts unknown to the plaintiff which were not in his possession at the time the first motion was denied and this would be largely a matter of judicial discretion. There being no bill of exceptions preserved containing the evidence presented at the time of the hearing of the motion on May 24th, and no appeal having been taken from that order, there is nothing for our consideration upon the present appeal and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, PJ. AND RYNER, J. CONCUR.

33024

127 a

JACOB ASHKENAZY,
Appellee,

v.

SAM BROWN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

252 I.A. 636

Opinion filed Feb. 27, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff Jacob Ashkenazy filed his suit in the Superior Court against Sam Brown, defendant, for malicious prosecution and obtained a judgment in the sum of $1,500.00, from which judgment this appeal was taken. The original bill of exceptions in the cause remains in the files of the Superior Court and a copy is incorporated in the record filed in this court.

December 22, 1928, L. A. Sherwin, counsel for the plaintiff, filed a motion on behalf of his client for leave to supply a correct copy of an exhibit contained in the record before this court and, in support of his motion, filed an affidavit charging counsel for the defendant with having fraudulently placed in the record an exhibit which was false and incorrect.

December 28, 1928, counsel for defendant filed his motion to reverse and remand, supported by affidavits, charging that Sherwin had falsely and fraudulently changed and altered the bill of exceptions in regard to material matters and procured the certificate of the court to said bill of exceptions without the knowledge of the court or

of counsel for plaintiff that said changes had been made in the bill of exceptions.

From the various motions, counter-motions and affidavits before us, it appears that the trial court still has before it the question as to whether or not the bill of exceptions had been falsified.

December 24, 1928, appellee, by his counsel, filed an additional abstract of record.

January 7, 1929, defendant filed a motion, by his counsel, to strike the additional abstract of record from the files on the ground that the additional abstract was false in material matters and contained statements therein which were not, in fact, either in the bill of exceptions or the record.

January 7, 1929, counsel for defendant entered his motion for a rule against Sherwin, counsel for plaintiff, to show cause why he should not be held in contempt of this court by reason of his filing a false additional abstract of record.

January 10, 1929, counsel for plaintiff obtained leave to file an additional and supplemental abstract of record which was granted and which upon examination shows an elimination of numerous matters set out in the first additional abstract. It also contains certain statements and averments, particularly as to the matters contained in the amended declaration which are not, in fact, borne out by the record. The question as to whether or not the amended declaration, upon which the trial was had, was sufficient to support the verdict, was a matter of importance upon consideration

of counsel for petitioners that such charges do not come to
law but, at most, [illegible].

From the evidence [illegible] [illegible] and
affirmative before us, it appears that the trial court [illegible]
was perhaps in the position to [illegible] the full of
exceptions for error (Ibid.).

December 20, 1966, [illegible] of the charges, filed
by [illegible] and [illegible] of [illegible].

January 7, 1967, [illegible] filed a motion, by [illegible]
counsel, to strike the [illegible] contained at [illegible] from
the [illegible] on the ground that the [illegible] contained
[illegible] in material [illegible] [illegible] [illegible]
which were [illegible], in fact, [illegible] the [illegible] of [illegible]
the [illegible].

January 7, 1967, counsel for [illegible] [illegible]
his motion for a [illegible] [illegible], [illegible] [illegible],
to allow [illegible] to file [illegible] [illegible] of [illegible]
[illegible] by reason of the [illegible] [illegible] [illegible]
[illegible].

January [illegible], 1967, [illegible] [illegible]
have [illegible] [illegible] [illegible] [illegible]
[illegible] which were [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]. It also [illegible] [illegible]
and [illegible], [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible], [illegible], [illegible] [illegible] by the
[illegible]. The [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible] [illegible], [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

of the appeal.

A reading of the motions, counter-motions and affidavits filed in this court, discloses charges by both sides of fraud, circumvention and unethical practice in the procuring and making up of the record now before us. We have not before us the original bill of exceptions and, therefore, can not consider the charged material changes made therein as they do not appear upon the face of the copy of the bill of exceptions contained in this record.

Under the circumstances, we are of the opinion that it would be impossible to arrive at a correct conclusion in the case by reason of the situation created by counsel, and that it is in the interest of justice that the entire matter should be re-heard, and with proper safeguards, for the obtaining of a correct record for the consideration of this court in the event of a future appeal.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HOLDOM, P. J. AND RYNER, J. CONCUR.

33047

128 a

B/G SANDWICH SHOPS, INC.,
a corporation,

Appellant,

v.

A. R. PRICE, doing business as Price Drug Company, and/or A. P. Drug Co., and/or Price Cartage Co., and LOUIS MORRIS, doing business as Lou Morris Floral Shop,

Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

252 I.A. 637

Opinion filed Feb. 27, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff, B/G Sandwich Shops, Inc., a corporation, brought its action in forcible entry and detainer against the defendant, A. R. Price, doing business as Price Drug Co. and others to recover possession of certain premises situated at 59 East Van Buren street in the City of Chicago. The action was predicated on a 30 day notice, based on the claim of the plaintiff that the defendant, Price, was a tenant from month to month and that the tenancy had been terminated under the notice as of April 30, 1928. Price defended on the ground that he was in possession under a three year lease and that the notice was not sufficient.

It appears that, with reference to the leasing of the premises between the plaintiff and defendant, three sets of leases were prepared and it is claimed on behalf of the defendant that the last lease was signed and delivered to him, but that he had lost it. He was unable to remember the date of the lease, nor was he certain who signed it on

[illegible]

[illegible] Co.,
a corporation,

Respondent,

v.

A. A. Porter, John Porter [illegible]
Price Iron Company, [illegible]
A. J. Ryan Co., [illegible]
Carbon Co., [illegible]
doing business as [illegible]
Fuel Shop,

Appellees.

Opinion filed Feb. 27, 1920

Mr. JUSTICE [illegible] delivered the opinion of the court.

The plaintiff, [illegible] Co., a corporation, brought its action in trespass [illegible] against the defendant, A. J. Ryan, doing business as Ryan Coal Co., for damages [illegible] of certain property alleged to be [illegible] in the city of Danville. The action was predicated on a [illegible], based on the claim of the plaintiff that the defendant, Ryan, had a lease for [illegible] to expire [illegible] last the tenancy [illegible] under the notice [illegible] 30, 1918. Prior thereto [illegible] they [illegible] under a [illegible] lease and that the notice was not [illegible].

[illegible] the pleadings [illegible] the issuing of the [illegible] and [illegible], there [illegible] of leases were [illegible] and it is [illegible] of the [illegible] that [illegible] to [illegible] [illegible] the date of the lease [illegible] [illegible]

behalf of the plaintiff. He relied upon a letter dated March 17, 1927, addressed to the A. P. Drug Co., Athenaeum Building, 59 East Van Buren street, Chicago, Illinois. The communication was as follows:

> "Gentlemen:
> We enclose herewith, duly executed, your copy of lease on Room 100 of the Athenaeum Building, for a term commencing February 1, 1927, and ending April 29, 1930.
> Thanking you for the favor, we are
> Yours very truly,
> Willoughby & Co."

The signature, Willoughby & Co., was written by hand, but there is no proof as to who wrote it, and one Windchy, an agent of Willoughby & Co., who had charge of the previous negotiations with regard to the rental of the premises on behalf of the B/G Sandwich Shops, Inc., testified that no lease had ever been entered into and that from an examination of the letter it was impossible to tell who, if anybody, in the employ of Willoughby & Co. had dictated or sent such a letter.

There was no proof offered on behalf of the defendant other than the introduction of the letter in evidence itself, connecting the letter with any person in the employ of Willoughby & Co. or with the plaintiff. A witness Forbes testified that he was in charge of the plaintiff company, as secretary, and knew the defendant, Price, and produced the copies of the unsigned leases which he testified were all that were prepared for the purpose of having the defendant sign, but that no one of these was signed and that there was no lease at any time executed of the premises in question by the parties. The defendant appears to have been unable to state what the terms of the agreement were and in view of the fact that the execution

behalf of the plaintiff". The action seems a larger claim March 17, 1977, addressed to Mr. R. Jess Q., Edmonton Building, 00 East 2nd Street, Calgary, Alberta. The communication was as follows:

"Gentlemen:

It seems strange, but anyway,
Your copy of letter on Jones I. of the Edmonton
Building, for a term commencing February 1, 1977,
and ending April 30, 1980.
Thanking you for the favor, we are
Very truly yours,
Willoughby & Co."

The signature, Willoughby & Co., was written by hand, but there cannot be no one write it, not even Vinsky, as head of Willoughby & Co., who had charge of the pending negotiations with regard to the lease of the premises on behalf of the Alta British Shops, Inc., testified that no issue had ever been entered into but that from the examination of the letter it was impossible to tell who, if anyone, in the history of Willoughby & Co. had dictated or sent such a letter.

There was no proof offered on behalf of the defendant other than the introduction of the letter in evidence itself, connecting the letter with any person in the employ of Willoughby & Co. or with the plaintiff. A witness Parker testified that he was in charge of the plaintiff company, as secretary, and knew the defendant, Price, and produced the original of the assigned lease which he testified was all that was necessary for the purpose of having the defendant sign, but that no one of them was signed and that there was no lease at any time executed the premises is occupied by the parties. The defendant appears to have been unable to state when the lease of the premises were and in view of the fact that the execution

of the lease, if at all, was shortly before the filing of this suit, it is difficult to understand the inability of the defendant to locate it.

April 8, 1927, over a month prior to the beginning of the suit in question, and after the alleged execution of the lease, the plaintiff by Forbes, its secretary, wrote Price a letter stating that a lease was prepared, awaiting his signature. Defendant appears to have made no reply to this communication to the effect that he already had a lease. It would have been natural for him upon receipt of such a communication to have immediately corrected the mistake contained in the communication of April 8th.

The burden of proof was upon the defendant, relying as he did upon a special written instrument as a defense. From an examination of the record in this case, we are of the opinion that this has not been done. The trial court erred in holding as it did and, in our opinion, the finding of the trial court is contrary to the weight of the evidence and for that reason the judgment will be reversed and judgment will be entered here for the plaintiff, finding the right to possession to the premises described as Room 100 and basement space thereunder in the building known as 59 East Van Buren street, Chicago, in the plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE FOR POSSESSION IN FAVOR OF THE PLAINTIFF.

HOLDOM, P.J. AND RYNER, J. CONCUR.

of the issue, if at all, the mortgagee notice the filing of this suit, it is difficult to understand the liability of the defendant to insure it.

April 7, 1977, over a month prior to the beginning of the suit in question, and after the alleged execution of the lease, the mortgagee by Torres, its secretary, wrote Fidelity Union stating that a lease was prepared, enclosing the insurance. Defendant appears to have made no reply to this communication to the effect that it already had a lease. It could have been assured for the mere trouble of such a communication to have immediately ascertained the liability continued in the condemnation of Spring Gin.

The burden of proof was upon the defendant, relying on the 1977 lease, which without instrument as a defense. From an examination of the record in this case, we are of the opinion that this has not been done. The trial court erred in holding as it did and, in our opinion, the finding of the trial court is contrary to the weight of the evidence and for such reasons the judgment will be reversed and judgment will be entered here for the plaintiff, fixing the right to insurance to the premises described as Blvd 100 and bears space increasing in the building known as 69 Lake Ave Green Street, Cicero, in the principle.

JUDGMENT REVERSED AND JUDGMENT ENTER FOR PLAINTIFF IN FIRST OF THE PLAINTIFF.

BURKE, P.J. and GORDON, J. concur.

32890

129 H

FULLERTON PLUMBING & HEATING CO., a Corporation,
Defendant in Error,

vs.

ELI METCOFF and LESLIE L. HECHT.

ELI METCOFF,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

252 Ill. 637

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Eli Metcoff, seeks to reverse a decree against him in a mechanic's lien proceeding.

The record discloses that on April 23, 1924, complainant and defendant, Metcoff, entered into a written agreement whereby complainant agreed to install the plumbing in a two-apartment building then being erected at 2141 Karlov avenue, Chicago, and Metcoff agreed to pay $950 for the same. Complainant began to install the plumbing and about July 1, 1924, it was paid $500 on account. A short time thereafter complainant, taking the position that it had completed all the work, demanded payment of the balance, which was refused, Metcoff contending that the work had not been done in a good and workmanlike manner as provided in the written contract. April 10, 1925, complainant filed its bill for a mechanic's lien in the municipal court of Chicago. It also filed a suit to recover a balance of $450 claimed to be due it. So far as we are advised, that suit was not disposed of.

After the issues were made up the cause was referred to a Master in Chancery who began taking proofs on October 13, 1925. The last evidence was offered before him May 21, 1927. There are about 470 pages in the record. The Master allowed the defendant three items of credit - one for $15 for replacing plaster

in the ceiling and walls which had been removed and cut out by complainant in connection with changing the gas pipe connections which complainant had improperly installed. Another item of $10 was allowed for repairing another opening made in the basement which should have been done by complainant; and one item of $5 to replace a "buffalo box" in connection with the shut-off valve which complainant also failed to do, making a total of $30. This left a balance due complainant as found by the master of $420. The master's fees were taxed at $450.

Defendant contends that complainant was not entitled to any lien on the premises in question because it did not install the plumbing in accordance with the terms of the contract, but that in any event the court awarded the lien for too large a sum; that defendant was entitled to a credit of $219.40 which the evidence shows was the amount he would be required to expend to place the plumbing in a good and workmanlike condition as the contract required. An examination of the record discloses the fact that there was a great deal of personal feeling between the parties, complainant insisting that he had properly installed the plumbing and that defendant was merely endeavoring to keep it out of its money. On the other hand, defendant's position was that the work had been improperly done and had not been completed, therefore he should not be required to pay for it.

We think we ought to say that after the parties had introduced some evidence on the first day of the hearing before the master, the hearing was continued, the master suggesting that the parties endeavor to settle the controversy. We will not enter into a detailed discussion of the evidence in the record, but are of the opinion that it is clear that complainant did not install the plumbing in a good and workmanlike manner. While it in the main substantially complied with the contract, there were a number of particulars

In the building for which they had been employed and had set by complainant to [illegible] with [illegible] and the [illegible] which complainant had [illegible]. Another item of $50 was allowed for [illegible] made in the [illegible] which should have been [illegible], and the item of $5 on [illegible] of "buffalo [illegible]" [illegible] which [illegible] also [illegible] a [illegible] of [illegible]. This left a balance the complainant [illegible] by the [illegible] of [illegible] which was fixed at $450.

Defendant contends that complainant was not entitled to any lien on the premises in question because it did not perform the plumbing in accordance with the terms of the contract, and that in any event the court erred the lien [illegible] and [illegible] that defendant was entitled to a credit of $[illegible] as the evidence shows was the amount he would be required to expend to place the plumbing in a good and workmanlike condition as the contract required. An examination of the record discloses the fact that there was a great deal of personal feeling between the parties, complainant insisting that he had properly installed the plumbing and that defendant was merely endeavoring to keep it out of its money. On the other hand, defendant's position was that the work had been improperly done and had not been accepted, therefore he should not be required to pay for it.

We think we would in any event affirm the decree had the [illegible] been [illegible] on the third day of the hearing before the master, the hearing was continued, the master suggesting that the parties endeavor to settle the controversy. We will not enter into a detailed discussion of the evidence in the record, but are of the opinion that it is clear that complainant did not install the plumbing in a first class workmanlike manner. While it is fair [illegible] substantially complied with the contract, there were a number of particulars

where the evidence shows this had not been done. It appears from the evidence there were two tenants living in the two apartments after the work was done; that the tenant on the first floor was using gas paid for by the tenant living on the second floor, which was due to the defective work of complainant in cross connecting the gas pipes, and that the tenant complained of this and it was corrected by complainant. The contract called for an "International Hot Water Heater" and an "International Laundry Heater" was installed, although the evidence further shows that these two heaters while not exactly are substantially the same. It further appears that a "buffalo box" was removed by complainant and that it failed to reinstall it, and there was evidence to the effect that the sink was defective in that the enamel peeled off; that the faucets were not properly connected. One of the tenants testified that the "faucets pulled out about one and one-half inches every time the water was turned on."

The contract called for a stone cover on the catch basin, while the evidence shows a concrete cover was used, but we think the contract was substantially complied with in this latter respect.

Upon a careful consideration of all the evidence in the record, we are of the opinion that complainant was not free from blame and that defendant was in some respects justified in refusing to pay the balance of the contract price. Under these circumstances, we think all of the costs should not have been taxed against defendant. We think the costs should have been equally divided between complainant and defendant.

Contentions are advanced by defendant as to whether the decree should be reversed or modified. We have carefully considered these contentions, but are of the opinion the court was warranted in entering a decree awarding a lien but that

complainant should be required to pay one-half the costs incurred in the trial court and in this court.

The decree of the Circuit court of Cook county will therefore be modified so as to require the costs to be divided as above stated, and so modified it is affirmed.

DECREE MODIFIED AND AFFIRMED.

McSurely and Matchett, JJ., concur.

32979

130

HERBERT A. DURR,
Appellee,

vs.

RICHARD E. SCHMIDT, HUGH M. G. GARDEN and EDGAR D. MARTIN,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

252 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Herbert A. Durr filed his bill for an accounting and after a hearing the court found there was due him $60,024.78, together with costs. A decree was entered that defendants pay the amount within thirty days, and the defendants prosecute this appeal.

The record discloses that defendants were architects engaged in the practice of their profession in Chicago, doing business under the firm name of Richard E. Schmidt, Garden and Martin; that complainant, who was a consulting engineer, was employed by them in 1906 and continued in their employ until April 26, 1919, when he was discharged. He received a salary of $26 a week in 1906; this was increased from time to time and for some time before he was discharged he was receiving a salary of $60 a week. The evidence further shows that sometime in the year 1917 complainant conferred with the defendant Schmidt to ascertain whether he would be permitted to solicit jobs for defendants and in case he was successful whether he would receive a certain part of the fee earned by them. Schmidt said it would be entirely proper for complainant to do this and that for any work he brought to defendants' firm he would be paid a commission or a certain part of the fee. It further appears that thereafter complainant solicited business and was successful in obtaining six jobs, in all of which he was paid a part of the fees which

defendants received for doing the work. In most of them he was paid 2/5 or 40 per cent of the fee. The evidence further shows that one of the jobs obtained by the complainant was the construction of the building which is designated in the record as the Sterling Manufacturers Building; that complainant entered into negotiations with the Pleas Construction Company, a corporation engaged in the construction of buildings in Chicago and with the owners of the premises, and that as a result of such negotiations a written contract was entered into whereby the Pleas Construction Company was to construct the building for the owners for a specified price. In this written contract, which is a printed form with certain spaces left blank, the defendants' names were printed as the architects of the building. They did the architectural work on the job and were paid their fee by the Pleas Construction Company, the contractor having included in the contract a sum sufficient to cover the architects' fee. In connection with the construction of the same building, Durr, the complainant, procured the execution of three other contracts - one for the installation of the plumbing between a plumbing concern and the owner of the premises; another for the installation of the heating plant; and another for installing the electrical equipment; each of these contracts was between the owner of the premises and a heating and an electrical company and were on the same printed form of contract as that used for the construction of the building. The evidence further shows that when Durr, the complainant, solicited the four contracts in connection with the Sterling Manufacturers Building, he obtained from each of the four contractors the amount of their bids, but before submitting the bids to the owners required each one to add something to the bid so that each of the four contractors' bids was submitted to the owner with the added amount, and required that in case they were awarded the contract

they would pay him the amount they had added to their bids. This was agreed to and the evidence shows that each of the four contractors, after the work was done, and paid for by the owner, gave the excess each had received over and above the amount of the original bids, to the complainant. And there is evidence tending to shew that Durr followed the same method in at least one of the other jobs obtained by him and that he was paid 40 per cent of the fees received by defendants on all jobs he procured for the firm. None of the defendants knew that complainant was "padding" the contractors' bids or that he obtained the amount of the "padding" as above set forth, until a few days before April 7, 1919, when defendant Schmidt learned of the method pursued by Durr in obtaining some of the contracts in reference to the "padding" of the bids, and at that time he spoke to complainant and requested that complainant go to see defendants' counsel, which complainant did and discussed with such counsel the fact that he had been "padding" his bills and the method pursued by him. Thereupon counsel suggested that complainant make a written statement of the matter, which he agreed to. A typewritten statement was then prepared by counsel and submitted to complainant, who examined it and apparently took it away from the office to go over it more carefully and, probably the next day, returned with the statement, when it was revised, reduced to typewriting and signed by complainant. This was on April 7, 1919. In this statement complainant says that in the spring of 1918 defendants had under consideration an arrangement with the Pleas Construction Company by which that company would make bids for the construction of reinforced concrete buildings according to plans designed by the defendant architects which should provide a lump sum for the construction of the building be paid by the owner to the Pleas Construction Company which would include an amount sufficient to pay the architects; that about this time complainant learned from

another employe of defendants, who made an agreement with the Pleas Construction Company in connection with their bidding for the construction of a building whereby the Construction Company added something to the contract price and paid such excess to the other employe, McNally; that in jobs obtained by complainant he conferred with the defendant Schmidt as to the amount of the architects' fees of each job and that it was agreed that complainant would have 2/5 of such fee; that complainant then entered into an agreement with the Pleas Construction Company whereby it would add to the amount of its fee a certain sum which they would pay to complainant when they had been paid by the owner for whom the Construction company was erecting a building. The statement further sets up that no member of the defendant firm knew anything about such "padding;" that on two of such jobs complainant was paid by the Pleas Construction Company between $10,000 and $10,000 which was the extent of the "padding" of the Pleas Construction Company's bids.

The evidence further shows that for more than a year prior to the time complainant was discharged he had been endeavoring to secure the employment of defendants as architects for a large plant that Bunte Brothers were contemplating; that he had a number of conferences with representatives of Bunte Brothers and considerable correspondence concerning the matter, and had from time to time advised defendants of what he was doing in connection with the matter; that at one time Bunte Brothers advised complainant that the matter be held in abeyance, which was done, and that in January, 1919, the matter was revived and the prospects appeared bright for obtaining the job for the defendants as architects, and that at that time, about January 17, 1919, complainant took the matter up with the defendant Schmidt, advised him of the prospects and asked Schmidt if he, complainant, would receive the

same percentage of the fee in case defendants were employed as architects on the job as he had theretofore been receiving, namely, 2/5ths. And complainant testified that Schmidt replied that complainant would receive 2/5ths of the fee in case defendants obtained the work, as he had theretofore been paid. Schmidt testified and admits the conversation but does not admit that he agreed to pay complainant 2/5ths of the fee. The master, however, who took the evidence and made up his report, found as a fact that about March 15, 1918, there was an oral agreement between complainant and the defendant firm whereby complainant was to receive 2/5ths of the fees received by defendants for jobs obtained by complainant for defendants, and further finds that Schmidt about January 17, 1919, promised to pay to complainant 2/5ths of the architects' fees in case they were employed on the Bunte job.

The evidence further shows that defendant Schmidt about April 8, 1919, knew of the written statement or confession made by complainant on April 7th, above referred to. Schmidt testified to this fact and the evidence shows that from that time on until the Bunte Bros. contract was awarded to defendants, which was about May 5, 1919, frequent negotiations were carried on between complainant and Bunte Bros., looking to the consummation of the deal, and that Schmidt and defendant Garden were assisting in these negotiations. During this time complainant called frequently on Bunte Bros., and on one occasion was told to have members of the defendant firm hold themselves in readiness to meet the board of directors of Bunte Bros. Complainant asked defendants Schmidt and Garden if they would hold themselves in readiness to attend the meeting and they agreed to do so. Durr testified that about the middle of April he was called into Schmidt's office and Garden was also called in; that Schmidt then asked complainant if he would accept 1/6 as his fee for the Bunte Bros. project; that complainant

same percentage of the fee in case defendants were employed as architects on the job as he had theretofore been receiving, namely, 2/5ths. And complainant testified that Russell replied that complainant would receive 2/5ths of the fee in case defendants supervised the work, as he had theretofore been paid. Russell testified and admits the conversation but says he never agreed to [illegible] to pay complainant 2/5ths of the fee. The [illegible] further, the case the evidence [illegible] in all points, [illegible] that about March 15, 1915, there was no [illegible] agreement between complainant and the defendant that [illegible] complainant was to receive 2/5ths of the fees received by defendants for work procured by complainant for defendants, and further [illegible] that defendants again [illegible] 17, 1916, promised to pay to complainant 2/5ths of the architects' fees in case they were employed on the [illegible] job.

The evidence further shows that defendant Russell, about April 6, 1916, came to the office [illegible] by defendants made an appointment to meet [illegible] Mr. Russell [illegible] that [illegible] on until the [illegible] the property is [illegible] was about May 1, 1916, [illegible] negotiations [illegible] carried on between [illegible] the negotiation of the sale, and that complainant and defendant [illegible] were [illegible] in these negotiations. [illegible] complainant assisted [illegible] of [illegible] to have [illegible] of the defendants [illegible] in [illegible] the board of directors of [illegible]. [illegible] asked defendants, Russell and Garden if they would give complainant 2/5ths [illegible] the meeting and they agreed to do so. [illegible] testified that [illegible] the middle of April he was [illegible] 2/5ths and [illegible] was also [illegible] to be paid except 1/5 of the fee for the [illegible]. However, [illegible]

stated he was surprised, that he had understood he was to be paid on the regular basis of 2/5ths as he had been paid on the other jobs; that Schmidt said it was a large job and that this job had never entered into the discussion about the division of the fee; that Schmidt offered him 1/6th of the fee but complainant refused, stating that on January 17, 1919, he had been promised 2/5th of the fee.

The defendant Garden testified that he was present at the conversation between Schmidt and complainant, which he placed at being just a short time before the directors' meeting of Bunte Bros. on April 23; that Schmidt asked the witness to come to his office, that complainant wanted to talk about the compensation in case the Bunte job was obtained; that complainant stated he thought his compensation should be the same as on other work he had brought into the office; that Schmidt said it would not be possible because the job was of a different character from the former jobs that complainant had obtained, was much larger and more complicated; that it cost defendants, as shown by their books, from 5[illegible] to 75 per cent of the fees they obtained to do the work and therefore they could not pay 2/5ths of the gross fee to complainant. The witness further testified that he stated he also had been instrumental in bringing in the Bunte job; that Schmidt then asked Durr if he would accept 1/5th of the fee, and further that Durr did not then state that he was surprised and understood he was to get 2/5ths of the fee.

Schmidt testified that he recalled a conversation with complainant April 23rd, at which defendant Garden was present; that this conversation followed a meeting of the directors of Bunte Bros. Company on the same afternoon; that the meeting was held in the witness' office and that complainant asked, "Am I going to receive 2/5ths of the fee on the Bunte Building," and that the witness re-

plied, "No," that he did not know what they could give complainant because he did not know enough about what work defendants would be required to do; that they had taken the mechanical work at an extremely low percentage and that they did not know the extent of the architectural work; that he would not agree to paying complainant more than Garden and Martin would receive as their share; that Martin was receiving 1/10th of the net profits and Garden 1/8th; that they did not reach any agreement at that time, and that he did not ask complainant if he would accept 1/6th of the fee if the Bunte job was obtained.

The evidence further shows that on April 23rd Bunte Bros. requested complainant and some of the defendants to attend the meeting of the board of directors with a view to presenting defendants' proposition to the board; that Durr at once told Garden of the matter but was unable to find Mr. Schmidt and that he and Garden went to the meeting of Bunte Bros.' directors and submitted the matter; that after Garden and he left the meeting he was advised by Bunte Bros. that the contract had been awarded to defendants and requested complainant to prepare a draft of the contract; that the next day he took the matter up with Mr. Schmidt, the latter prepared a draft of the contract and submitted it to complainant for suggestions, which were made. The evidence further shows, as testified to by Schmidt, that about the next day, April 25th, he, Schmidt, called up Bunte Bros. and inquired whether it would make any difference to Bunte Bros. as to the obtaining of the contract by defendants if defendants discharged Durr, and that he was advised that it would make no difference; that on April 26th he endeavored to see complainant but was unable to do so and thereupon wrote complainant a letter discharging him. In this letter it is stated: "In view of the fact that, without the knowledge of any member of this firm, you have taken commissions or profits out of contracts between this firm and its clients and, by your

attitude, have proclaimed that you consider this within your code of business morals, we wish to terminate, and do hereby terminate, your employment with us." A check for $240 was enclosed paying complainant's wages four weeks in advance, although it was stated they did not expect any further services to be rendered by him.

The case was referred to a master in chancery to take proofs and make up his report. A great deal of evidence was introduced. The master found the facts substantially as above set forth. He also found the amount of fees earned and received by defendants for jobs obtained by complainant and the amount which defendants paid complainant on account of such fees. He further found the amount of the "padding" of the bills by the complainant as above stated and the amounts that complainant had received on account of such "padding" from the contractors who constructed the buildings or installed some of the work in the buildings; that defendants received $113,392.69 for their fees as architects on the Bunte project and 2/5ths or 40 per cent of that is $45,359.88; that, although the defendants did something towards obtaining the Bunte job, complainant, Durr, was instrumental in obtaining this job for defendants and entitled to 2/5ths of the fee; that complainant should have received no fees from those jobs in which he had caused the bids to be "padded" and charged sums against complainant where he found such bids had been "padded." Complainant was claiming there was a balance due him on most of the jobs obtained by him. The master disallowed all except the Bunte job and an item of $257.04, plus $75.34 interest thereon, making a total of $332.38, which he found was a balance due complainant on the Twin Tube and Rubber company job. The finding of the master was approved by the chancellor.

We think the item of $332.38 above mentioned ought not to have been allowed. Complainant in his bill substantially enumerated the jobs on which he claimed there was a balance due

[illegible]

him and the Twin Tube job was not mentioned.

Defendants contend that since the evidence shows, and the master and chancellor found that the complainant, Burr, was dishonest in connection with his employment with defendants, he was not entitled under the law to any compensation, for the reason that where an agent commits a fraud on his employer he forfeits all compensation, and further that since the complainant was rightfully discharged by defendants on account of his misconduct, he is not entitled to recover compensation which accrued after the date of his discharge. A number of authorities are cited and discussed in support of these two contentions, but we think it would serve no useful purpose to refer to them here. On the other hand, complainant's counsel in their brief contend that complainant predicates his right upon the theory that the agreement between him and the defendants was in the nature of a joint venture and that it is not based upon a contract of agency or employment; that in any event, complainant is entitled under the law to recover his share of all fees received by defendants on all jobs procured by him as to which jobs there was no misconduct, even if complainant may be considered the agent of defendants in obtaining such jobs; and further, that the evidence fails to show any misconduct on the part of the complainant because what he did in obtaining the contracts was no different from the acts he did in procuring the Twin Tube and Rubber Company job, where there was an express agreement between him and defendants by which they agreed to add to their fee a sum sufficient to cover what they were to pay complainant for obtaining the job. And in counsel's brief for complainant, authorities cited and discussed tend to sustain contentions made by them; but we are of the opinion it would be of no service to comment upon this phase of the case, because in the instant case the decree entered settled the amount between complain-

ant and defendants except as to two items, viz., the Twin Tube job and the Bunte job, and no complaint is made by complainant to the report or to the decree. And since we eliminate the item allowed for the Twin Tube job, the only matter remaining is the fee obtained from the Bunte job. While it is true that an agent who has been dishonest with his employer forfeits all his compensation, yet we think that rule is not applicable in the instant case so far as the Bunte job is concerned, because the uncontradicted evidence shows that defendants, about April 7, 1919, before the Bunte job was obtained, were apprised of all of the acts of complainant in reference to the "padding" of the bids of which they now complain, yet, notwithstanding this fact, by their acts and deeds they induced complainant to continue his negotiations with the Bunte Bros.' representatives in an endeavor to obtain the job and led him to believe he would be paid in case he obtained the job. The uncontradicted evidence shows that after defendants were advised of the misconduct of complainant they held numerous conferences with him; that he held a great many conferences with the Bunte Bros.' representatives and finally succeeded in obtaining the job, as the master and chancellor found, which finding we think is sustained by the evidence. The only dispute on this phase of the matter is as to whether it was agreed that complainant was to receive 2/5ths of the fee or whether the amount of his compensation had not been agreed upon as the defendants testify. On this controverted question of fact the master found in favor of complainant, his finding was confirmed by the chancellor, and we think we would not be warranted in disturbing the finding because we are unable to say that such finding is against the manifest weight of the evidence. It is obvious that defendants did not let the dishonesty of complainant interfere with his getting the Bunte job. They considered it of no moment in the

matter. Of course this action of defendants would not and did not prevent them from discharging him for his dishonesty, but they ought not now be heard to say that he is not entitled to be paid for obtaining the Bunte job.

The master found, after including the item of $332.38 for the Twin Tube job above mentioned, there was a balance due complainant from defendants on April 22, 1926, of $54,015.55. The item of $332.38 should be deducted from this latter sum, leaving a balance due on the day last mentioned of $53,683.17. Interest should be figured on this sum at 5 per cent from April 22, 1926, the date of the master's report, to July 14, 192[illegible], the date of the entering of the decree, making an aggregate sum of $59,662.87 due complainant. The decree of the Circuit court of Cook county is modified as above stated and as so modified it is affirmed.

DECREE MODIFIED AND AFFIRMED.

McSurely and Matchett, JJ., concur.

33060

ANTONIO BALSAMO,
Appellee,

vs.

CESARE MUTINI, PIETRO VERZANI,
SERAFINO BIAGI, EMILIO RIANI
and GUISEPPE CIPOLLINI,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover $318 which he claimed to be due him on account of a deposit made under a written contract. The case was tried before the court without a jury, there was a finding and judgment in plaintiff's favor for the amount of his claim, and defendants appeal.

The record discloses that Carmine Campitello owned and conducted a bakery and on July 15, 1925, entered into a written contract with plaintiff whereby he agreed to sell and plaintiff agreed to buy from 500 to 800 pounds of bread daily covering a period of thirteen months. The contract states that Balsamo, the plaintiff, to insure the carrying out of the contract on his part deposited with Campitello $300, and the contract provided that in case Balsamo carried out the terms of the contract the $300 would be returned to him with interest thereon at the rate of 6% per annum.

It further appears that by mutual agreement the period covered by the contract was extended for a period of one year. While this contract was in force Campitello sold his bakery to defendants, the sale being evidenced by a written agreement entered into by the parties on October 1, 1926. It is stated in that contract that the sale of the bakery was made subject to the con-

23500

ANTONIO [illegible],
Appellee,

vs.

GEORGE [illegible], [illegible],
[illegible] [illegible],
and [illegible] [illegible],
Appellees.

tract existing between Campitello and Balsamo and that defendants assumed and agreed to carry out that contract. It further appears that Balsamo carried out the contract by purchasing the bread from Campitello and later from defendants, and that he demanded the return of the $300 from defendants, which demand was refused.

Defendants contend that they are not liable because they are not a party to the contract entered into by Campitello and Balsamo, but there is no merit in this contention because when Campitello sold the bakery to defendants the written agreement expressly stated the sale was made subject to the contract between Campitello and Balsamo, which contract defendants assumed and agreed to carry out. Under the law defendants were liable to refund the $300 to plaintiff. Deem v. Walker, 107 Ill. 54[illegible].

A further contention is made that since the evidence shows that Campitello, at the time he sold the bakery to defendants, did not turn over to them the $300 deposit, they are not liable in the instant case. What we have said disposes of this contention adversely to defendants. Obviously, we are not passing upon the merits of any controversy that may exist between Campitello and defendants with reference to the $3[illegible].

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

33191

132

B. F. ANDREWS, Doing Business as B. F. Andrews and Company, Appellant,

vs.

JAMES LOVETT, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note dated May 9, 1927, brought suit against defendant, James Lovett, the maker of the note, to recover the amount due as shown by the face of the not which was $275 with interest. The suit was filed March 22, 1928, and the summons issued returnable March 29th. The bailiff served the summons on defendant March 23rd and on March 28th defendant entered his appearance. On the return day, March 29th, an order was entered on motion of defendant extending the time within which he might file his affidavit of merits ten days from that date. The affidavit of merits was not filed within the ten days but was filed April 11th, which was three days too late. April 12th an order was entered defaulting defendant for want of an affidavit of merits. June 7th following, on motion of defendant the default was set aside and July 11th the record states that the cause came on for hearing "in regular course for trial," defendant not appearing; that the court heard the evidence and argument of counsel, found the issues in favor of the plaintiff and assessed his damages at $283.24.

August 16th, which was more than thirty days thereafter defendant filed his petition praying that the judgment of July 11th be set aside and vacated. The prayer of the petition was allowed and the judgment vacated. From this order plaintiff appeals, so the only question is the sufficiency of the petition, which it is

B. A. Gallagher, John Gallagher
as L. T. Murphy and John Doe,
Appellants,

vs.

Jacob Lazar,
Appellee.

Appeal from Municipal Court
of Chicago.

Honorable John Sbarbaro, Judge presiding.

Mr. Justice Jones delivered the opinion of the court.

Plaintiff, the owner of a mortgage, sued out a writ of replevin against defendants, Jacob Lazar, the owner of the note, to recover the amount due on the note by the terms of the mortgage which was duly filed and recorded. The suit was filed April 27, 1927, and the summons issued concerning same. The writ of replevin was served on defendants Lazar and on Lazar the mortgagee, seizing the mortgaged merchandise. On the return day, March 21st, a trial was entered on motion of defendants and judgment rendered in their favor. The attorney for appellee had filed a stipulation of dismissal for the plaintiff, which was filed April 1st, which was approximately one week after the order was entered. Defendants contend that the stipulation of dismissal was ineffectual for want of an attorney of record. Prior to judgment, a motion to strike the motion for judgment was sustained and duly filed the "motion to dismiss" which was denied by the trial court. Appellants contend that the court erred in sustaining the motion to dismiss, and in denying the motion to strike the judgment in favor of the defendants, and therefore the judgment is erroneous.

August 12th, which was more than twenty days subsequent to defendant filed his motion to strike the judgment, the judgment of May 21st was set aside and vacated. The order of vacation was signed and the judgment vacated. Even this order stands unchallenged, so the only question is the sufficiency of the pleadings, which it is

stated was filed under section 21 of the Municipal Court act.

The petition set up that "the above entitled cause was set for hearing at a time other than the regular time for the setting of a case of this sort for trial, namely, the return day for Merits, and that no notice was ever given to this affiant or to his attorney that said case had been set for trial." The petition further set up that the judgment was entered by default on July 11th; that the attorneys for the plaintiff "held up the execution for a period sufficient to allow the elapse of 30 days before the judgment debtor would be notified of said judgment in the ordinary course." This petition is signed in the name of the defendant by his counsel and sworn to by counsel. Obviously the petition did not authorize the court to vacate the judgment. It does not show that defendant had any meritorious defense and this is always a prerequisite to the opening up of the judgment.

The petition was further defective in that it contradicted the record. It set up that the cause was set for hearing at a time other than the regular time, which was "the return day for Merits." We do not know what this means, but the record of July 11th shows that the cause came on in regular course for trial and this cannot be contradicted in the method attempted here.

The court was without authority to open up the judgment and the order appealed from is reversed.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

ground the first order setting it at the [illegible], [illegible].

The petition set up that the [illegible] [illegible] was set for hearing, at a time other than the regular time for the setting of a case of [illegible] the [illegible], namely the second day for hearing, and that no notice was given [illegible] to this petitioner or to his attorney that said case had been set [illegible]. The petition further sets up that the judgment [illegible] by default in July 11th; that the allegation [illegible] by the petition for a second [illegible] to be- fore the judgment [illegible] in the ordinary course." This petition is [illegible] by the defendant by his counsel and [illegible]. Obviously the petition did not entitle the court to [illegible] the judgment. It does not show that defendant had any meritorious defense and this is always a prerequisite to the opening up of the judgment.

The petition was further defective in that it contradicted the record. It set up that the cause was set for hearing at a time other than the regular time, which was the second day for hearing. As to the cause [illegible] the record [illegible] as of July 11th shows that the cause came on in regular course for trial and this [illegible] of the original [illegible].

The order appealed from [illegible] of the judgment [illegible] granted the [illegible].

[illegible], [illegible].

[illegible] and [illegible], [illegible].

33057

133 A

ELSIE C. MOORE,
Appellee,

vs.

MUTUAL CONSTRUCTION COMPANY,
a Corporation, et al.

Appeal of CROWE BROS.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

25 I.A. 638

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, as lessee, occupied premises at number 46 East Superior street, Chicago, as a rooming house. The owner of the adjoining lot on the east undertook to excavate and drill piles for the purpose of erecting a building thereon. Plaintiff claims that in doing this the premises occupied by her were damaged. She brought suit against various contractors and upon trial the jury found all the defendants not guilty except defendants John V. Crowe and Albert J. Crowe, copartners doing business as Crowe Bros., who were found guilty and plaintiff's damages were assessed at $1500. Crowe Bros. appeal from the judgment on the verdict.

The premises occupied by plaintiff under lease expiring April 30, 1926, was a brick and stone two story and basement building, about 25 feet wide by 60 feet long. There was also a two-story garage on the rear of the lot. A number of witnesses testified that before the work on the adjoining lot the building was in a good, solid and substantial condition; there was no sagging or cracks in the walls, floors or ceiling and the plumbing was in good condition. In 1925 the owner of the adjoining lot on the east made a contract with the Mutual Construction Company for the erection of a building on the lot, which included wrecking the building then standing thereon and excavating an area approximately 50 x 175 feet to a depth of 14 feet below the sidewalk

33027

[illegible] v. [illegible],
Appellant,

vs.

[illegible] Insurance Company,
a corporation, et al.

Appeal of [illegible],
Appellant.

level. Plaintiff's building had a foundation of rubble stone to a depth of five or six feet below the ground surface. The Mutual Construction Company employed certain of the defendants to do the excavating. On June 1, without any notice to plaintiff or consent from her, one of the defendants commenced excavating with a steam shovel, finishing about June 16. When the excavator completed the work he left a shoulder or bank of earth extending out at the bottom 10 feet from the east wall of plaintiff's building.

On or about May 29 Crowe Bros. entered into a verbal contract with plaintiff's lessor to underpin or support the building occupied by plaintiff, and on June 9 had another verbal agreement with plaintiff's lessor to extend the footings under the building down to the new excavation level and to hold up and shore the east wall of said building. June 6 Crowe Bros. also made a contract with the Mutual Construction Company for supporting the building on the west lot line of the site where the proposed new structure was to be erected, and Crowe Bros. agreed to furnish all material and labor necessary to complete sheeting and shoring of the adjoining property on the west in a secure and satisfactory manner, all embankments to be securely braced and held in place without movement at all times and continuously to guard against the loss of alley or street pavement or adjoining lot line property. A. J. Crowe, one of the defendants, testified that the soil beneath plaintiff's building was of a dangerous character, the first 8 feet below the surface being sand and below that a fine gray sand or silt, which the witness characterized as quicksand.

That plaintiff's building was injured during the process of the work seems to be conceded, but the defendants Crowe Bros., earnestly argue that there was no evidence that the injuries were caused by any negligence on their part and that the evidence

rather shows that they were caused by the pile driving and excavating

The witness Crowe testified that the proper way to underpin plaintiff's building was to remove sections of 5 or 6 feet of earth beneath the foundation of the east wall and put in wooden braces under such sections and then extend the concrete foundation from the bottom of the old foundation to a point below the excavation made for the new building and by the use of jacks and levels from day to day, as the work proceeded, the level of plaintiff's wall could be maintained. There was testimony tending to support defendants' claim that the work was properly done in this manner. However, there were a number of witnesses who testified to the contrary; that when Crowe Bros. removed the shoulder of earth left by the excavators, they did not do any underpinning or bracing for some days; that when the pile driver was operating Crowe Bros. had placed no jacks under the wall of plaintiff's building. When the excavators worked in the front of the lot the front yard of plaintiff's premises caved into the excavation, as there were no jacks or shoring along the east side of the building line at that time; as a result of this the east wall of plaintiff's building buckled and cracked. The floor shifted some 6 inches and the wall of the bedroom occupied by plaintiff on the first floor fell, leaving a large hole. There was testimony that the workmen expressed apprehension that the house was going to fall. There was evidence from which the jury could properly conclude that the damage to plaintiff's wall occurred after the excavator had quit and was caused by the absence of any shoring under the east wall of plaintiff's house; that the cracks came in the walls and building while Crowe Bros. were putting jacks under the house and removing the shoulder, and that the building was three weeks without jacks and that the underpinning was not done until the latter part of June. Sewer water accumulated in the excavation and ran into

plaintiff's premises to a depth of over a foot over her floors. The lights and the toilet pipes became disconnected and the toilets could not be used. A mantel and fireplace in the front room fell down. The house began to lean to the east. There was no shoring in the front yard and all the room walls were cracked. There was evidence tending to show that because of the cracked walls the plastering and ceiling fell, and the tenants moved out. There was also damage to furniture.

Plaintiff gave no consent to the alteration of the garage in the rear, but Crowe Bros. removed the eastern wall entirely. It was sought to justify this upon the assertion that this wall was partially standing on the lot on the east.

This is not a case of one seeking to recover damages because of the withdrawal of the lateral supports of the neighboring soil. Plaintiff seeks to recover damages because the work which Crowe Bros. did in protecting her wall was done in so careless and negligent a manner as to cause injury to her premises. Under such circumstances, the right of a lessee for injury to his possession has been established. See City of Quincy v. Jones, 76 Ill. 231; Conklin v. Newman, 278 Ill. 30; and the later case of Best Manfg. Co. v. Creamery Co., 307 Ill. 238. See also Canfield Rubber Co. v. Leary, 99 Conn. 40; Davis v. Summerfield, 131 A. C. 352; Gildersleeve v. Hammond, 109 Mich. 431.

The jury was fully justified in finding that the defendants Crowe Bros. so negligently did their work that plaintiff suffered damages.

We cannot say that the amount of the verdict was excessive. Evidence was introduced as to the specific elements of damage and as to the loss of income caused by plaintiff's roomers leaving the building.

The burden of defendants' brief seems to be that the

plaintiff's premises at a point of about a foot from the floor. The lights and the adding machine became disconnected and the billing could not be sent. A manual was furnished in the books [illegible] down. The rooms began to fill up to the ceiling. [illegible] in the front part and all the stock [illegible] [illegible]. There was evidence showing [illegible] the [illegible] to the plaster, walls, the plastering and ceiling fell, and the [illegible] walls. There was also damage to furniture.

Plaintiff gave in evidence [illegible] the [illegible] of the garage in the rear, and Crowe Bros. [illegible] the [illegible] [illegible] excessively. It was enough to [illegible] this upon the [illegible] that this wall was partially [illegible] of the [illegible].

This is not a case of the [illegible] to [illegible] the [illegible] because of the withdrawal of the lateral support of the adjoining wall. Plaintiff seeks to recover damages because of the work which Crowe Bros. did in [illegible] the wall and [illegible] it in [illegible] less and negligent a manner as to cause injury to the plaintiff. Under such circumstances, the right to a [illegible] the [illegible] of his possession had been [illegible]. See [illegible] v. [illegible], [illegible] Ill. 271; [illegible] v. [illegible], [illegible] Ill. [illegible]; and [illegible] Tent Mfg. Co. v. [illegible] Co., 240 Ill. 528. See also [illegible] Rubber Co. v. [illegible], 53 Conn. 451; [illegible] v. [illegible], 101 U. S. 338; Gilderaleeve v. Hammond, 109 Mich. 342.

The jury was fully justified in finding that the defendants Crowe Bros. so negligently [illegible] that plaintiff suffered damages.

We cannot say that the amount of the verdict was excessive. Evidence was introduced as to the plaintiff's business and damage and as to the loss of income caused by plaintiff's [illegible] leaving the building.

The burden of defendants' brief seems to be that the

damages were caused by the excavators and the pile drivers and not by Crowe Bros.; but it is obvious that Crowe Bros. undertook to protect plaintiff's property from such damages and they performed this work so negligently that plaintiff was damaged, and for this they are liable.

Upon the entire record we find no justification for reversal, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

33151

FRANK NIEDOSPIEL,
Defendant in Error,

vs.

CATHERINE NIEDOSPIEL et al.,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

135

252 I.A. 638

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Catherine Niedospiel (hereafter called defendant) seeks the reversal of a decree entered in a divorce proceeding. The bill charged adultery and the decree in this respect is not questioned by the defendant. Complainant made the Krolowa Jadwiga Building & Loan Association a co-defendant with his wife, alleging that complainant and defendant had a joint account with this Association in the sum of approximately $2,000; that all of said moneys belonged to complainant and were his sole funds and were placed in a joint account because of complainant's reliance on the fidelity and faithfulness of his wife. The bill asked that the funds on deposit with the Building Association be decreed to be the funds of complainant and that said Building Association be decreed to pay said money to complainant.

Service was had on the wife by publication. She filed her appearance and answer. The Association was served with summons, but never appearing nor filing its answer, was defaulted. The wife did not appear at the trial, and complainant's allegations as to her misconduct were not contested.

The secretary of the Association testified that on May 12, 1927, which was more than five months after it had been served with summons, he paid to Mrs. Niedospiel all the money coming to her and her husband jointly. The attorney for the Association was also the attorney for Mrs. Niedospiel, both in the trial court and in this court, and the money in the joint account was paid to her at the request and upon the advice of this attorney.

Defendant left her husband to live with another man, taking the child born of the marriage and also $1200 of complainant's money which he was keeping in a trunk in their home. She sent her husband a letter to the effect that she did not ask anything more from him than the money she had taken, which she said she had taken so that she would not starve before she got a job.

Counsel for the defendant asks this court to decide whether it is lawful to confiscate a wife's property solely upon proof of her adultery, but we do not consider this question relevant or material upon the instant record. The Association has already paid the amount of the joint account to the defendant. She has also taken the $1200 which complainant was saving. We can discern no grounds whatever for the defendant to question the decree.

The Association might have some right to complain, but, although served with summons, it did not see fit to appear in the case, was not present at the trial and prayed no appeal from the decree nor sued out a writ of error. Inspection of the record in this court shows that it was served with summons from this court ordering it to appear and join in the prosecution of this writ of error, but it did not see fit to do so, so that an order of severance has been entered forever barring it from questioning or impeaching the decree of the Superior court.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

Defendant left her husband in the fall of [illegible], taking the child born of the marriage and has given no [illegible] which he was living in a trunk in [illegible]. She sent her husband a letter in the [illegible] that she had left [illegible] from him than the money she had taken, which she said she had taken so that she would not starve before [illegible] job.

Counsel for the defendant [illegible] this court is doubtful whether it is lawful to confiscate a wife's property solely upon proof of her adultery, but we do not consider this question relevant or material upon the [illegible] record. The legislature has already paid the money to the [illegible] to the defendant. The [illegible] take the [illegible] constitutional rights. We see disaster and grievous wrongs for the defendant in quashing the decree.

The respondent might have right to complain, but, although served with summons, he did not [illegible] in the case, was not present at the trial and proved no appeal from the decree nor made out a [illegible] of error. Consideration of the record in this court shows that it was proved with sufficient [illegible] this case [illegible] and this is the presumption of this writ of error, but it did not see fit to do so, so that an order of restitution has been entered forever barring it from questioning or investigating the terms of the divorce court.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, J., J., not participating, J., absent.

33270

136 (1)

252 I.A. 638

OLE N. OLSEN, administrator of the estate of Minnie Olsen, deceased, Plaintiff in Error, v. RIVERVIEW PARK COMPANY, Defendant in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In June, 1926, at about 10:45 p. m., Minnie Olsen, hereafter called plaintiff, while riding on a circular railway called the "Bobs" in defendant's amusement park, was thrown or fell therefrom and received injuries resulting in her death. Her administrator brought suit and upon trial by the jury a verdict was returned finding defendant not guilty. Plaintiff seeks by this writ of error the reversal of the judgment on the verdict.

Plaintiff's declaration, after describing in general terms the railway and cars constituting the device, alleged that plaintiff became a passenger thereon for hire and that while riding on the car, in the exercise of ordinary care for her own safety, because the railway car and its appliances were negligently and unskilfully constructed, maintained and operated, was thrown violently from the car sustaining injuries. Plaintiff first argues that the clear preponderance of the evidence shows that defendant was guilty of the negligence charged in the declaration.

The "Bobs" is a circular railway about 1600 feet long.

It starts from a platform at the west end of the structure at a height of approximately 65 feet from the ground and runs up and down with about 9 sharp inclines and around many reverse curves until it returns to the starting point. The trains are hauled up the first incline by an endless chain and thereafter run by gravity. Each train consists of 11 cars coupled together and each car contains a single seat capable of seating two adults. They run on a narrow gauge track of rails of about 28 inches apart. At the curves one rail is pitched higher than the other, and when the cars pass over this curve one side is about 9 inches higher than the other. The speed at the bottom of the inclines is about 35 or 40 miles an hour.

Each car is equipped with a handle bar extending the width of the car which can be pushed forward and backward. When people are entering the car this bar is pushed forward; when passengers are seated the bar is pushed backward and downward towards them and when it is pulled back as far as it will go, it is about 4 or 5 inches above the knees of a normal person sitting on the seat of the car and about 24 inches from the waist-line of a normal person. Each handle bar is equipped with a lock which is below the footboard; when the bar is pulled backward and downward towards the passenger as far as it will go, it locks automatically and when thus locked it cannot be unlocked or moved backward and forward until the car makes the trip on the railway and finally returns to the loading platform. As the trains approach the loading platform on their return trips, a block which they pass over automatically unlocks all the handle bars of the train. There is no device for locking all the handle bars at once, but each is independent of the other

cars. Defendant maintained guards to close and lock these bars after the passengers had entered them. The passengers themselves could lock the bars by pulling them back to the proper position but defendant gave its guards orders to see that all the handle bars were closed and locked before the trains were pemitted to leave the platform.

There were two large printed signs on the platform with these words: "Hold Your Hats - Don't Stand Up" and on the back of each car in plain view of the person sitting in the seat behind was a painted sign as follows: "Don't Stand Up - Pull Back Handle Bar Until Locked." Plaintiff questions the presence of this latter sign at the time of the accident, but this was sufficiently established.

On the day of the accident citizens of Chicago of Danish birth held a picnic on the grounds immediately adjacent to the defendant's park and under an arrangement they were permitted to enter the park grounds. Plaintiff and her husband and some of their friends attended the picnic and used some of defendant's amusement devices. Plaintiff was about 5 feet 5 inches in height and weighed approximately 200 pounds. This was her second ride of the day on the "Bobs" and she had also had two other rides on another device of a similar type.

At the time of the occurrence Samuel Larson occupied the car with plaintiff, she sitting on his left side. They were about the middle of the train. Larson testified that when they got in they pulled the handle bar back until it was as close to plaintiff's body as it would go; that he heard none of the guards say anything about it and none of them touched it. Plaintiff had hold of the

cure. Diplomat multiplies quarts to gives an link those have after the passengers had entered them. The passengers immediate could look the here by pulling them back to the upper position but detectives gave the grants orders to see that all the hatchs here were closed and locked before the train was permitted to leave the station.

There were two large painted signs on the platform with those words "Hold fast here - Don't stand up and on the back of each car in plain view of the passengers sitting in the first compartment was a painted sign as follows: "Don't stand up - Hold tight - Hold onto the Uncle Lucas." Finlayson conceived the proposed at this letter sign as the line of the accident, but did not actually ex- tablished.

On the day of the accident citizens of Chicago of Lawrence Brick Bell's place on the street immediately adjacent to the detectives' park car under an arrangement they were permitted to enter the park grounds. Finlayson and two witnesses and some of Sheriff Tricoche stationed the plants the most case of Lawrence's amusement devices. Finlayson was about 2 feet 2 inches in height and weighed approximately 250 pounds. This was his second ride on the day on the "Bobs" and was the also the two cases taken on another testing of a similar type.

At the time of the occurrence Samuel Lawrence occupied the car with Finlayson, who sitting on his left side. They were about the middle of the train. Lawson testified that when they got in they pulled the handle bar down until it was as close to Finlayson's body as it would go; that he heard some of the passengers say anything about it and some of them checked it. Finlayson had hold of the

bar with her left hand, and in her right hand she carried a pocket book. Larson described the accident as follows:

> "When we started to go up the third incline it bounced up a little in the car. We bounded up. Then we got into a curve. The car gave a few jerks. Her seat went up a little and mine went down and threw her out. It threw her out on the right side over me, between the bar and me. She went on my side and went down. As she was being pitched out the bar was forward, opened up. The bar opened up and she fell out. The bar was about a foot in front of us and she passed between the bar and me over my legs. After she was pitched out, I pulled the bar back. I started to grab for her. I had no chance, she went out so fast. She went right over my lap and out."

Plaintiff argues that the preponderance of the evidence proves that the handle bar was not locked and that this was negligence on the part of defendant which caused plaintiff to be thrown from the car. This is partly based on Larson's statement that the "bar opened up" when she fell out. However, his testimony at the trial was weakened by his admission that within a half hour after the accident he gave a statement to one of defendant's attorneys in which he said "the handle that goes across your waist was closed when we started out, and was still closed when we came in" and at the coroner's inquest he testified that when they got into the seat:

> "I pulled it (the handle bar) back and closed it.
>
> Q. Are you sure you closed it? A. So far as I know, I don't think you could close it any better.
>
> Q. But you are sure it was locked? A. Yes, it was locked when we started off."

Two of the defendant's employees who were charged with the duty of locking the bars testified that it was locked before the train started.

But counsel for plaintiff earnestly argues that it was physically impossible for plaintiff to be thrown from the car if the bar was locked. Some five witnesses - two of them plaintiff's witnesses - testified to the effect that a passenger must hold on

the bars or he may be thrown out even with the bar locked. One witness said it was necessary to hold onto the bars with both hands and that a person standing up or attempting to rise on his feet while the car was going and not holding on could not be prevented from being thrown out; that this was true of a large or a small person; "that even if the bar were close to the body, there is nothing to prevent you from getting up if you want to get up." The witness who saw the occurrence most clearly was Lars Nissen, who was with plaintiff's party; he was sitting in the seat directly back of the car occupied by plaintiff and Larson. He says that plaintiff lost her balance going down the second incline "and it just threw her over and she seemed to fly out from the seat. Fell out. I tried to stand up in the seat and tried to stop her." This witness said he saw the man riding with plaintiff fasten the bar of their car before they started. He further said:

> "When we got up on the second hill there I believe she was kind of high between the bar and the seat. She kind of got up, -
>
> Q. Straightened up on her feet.
>
> A. Yes.
>
> Q. Raised up above the seat.
>
> A. Yes, she very likely didn't - wasn't prepared for it coming, and she got kind of high, and it just threw her off, when she was about halfway down the second hill, halfway down the second hill she just flew out just like that; on the right hand side. I saw her when she fell. There was absolutely no way I could grab her because it just seemed like she just jumped out the seat and flew right over. I noticed when we came to a stop that the bar was in its proper position."

The witness further said that he saw plaintiff holding onto the bar with her left hand and holding her pocket book with her right hand.

the bend or he may be thrown out when [illegible] the car turned. The witness said it was [illegible] to [illegible] he been all [illegible] hands and that a person [illegible] in the car on his feet while the car was going [illegible] and he prevented from being thrown [illegible] of a large or a small person; that [illegible] there is nothing to prevent the [illegible] the car. The witness who was [illegible] with plaintiff's policy in [illegible] back of the car occupied by plaintiff and [illegible]. Plaintiff lost her balance [illegible] just thrown her over and she [illegible] over the seat. Well, I tried to stand up in the back and [illegible] to stay down. This witness said he saw the man talking with plaintiff just a [illegible] of [illegible] car before they arrived. On further [illegible]:

> "When we got up in the evening [illegible] I believe she was kind of [illegible] the car and the seat. The kind of [illegible]."

Q. Corroborated by your [illegible].

A. Yes.

Q. Raised up above the seat.

A. Yes, she was very [illegible] - [illegible] for it [illegible], and she was kind of [illegible] and it just threw her off, when she was about [illegible] down the [illegible], holding down the [illegible] she just [illegible] and just [illegible] on the [illegible] side. I was not with the [illegible]. There was absolutely no way I could [illegible] the [illegible] like the just jumped and the [illegible] over. I noticed when we came to a stop that she was in the proper position."

The witness further said that he was [illegible] holding onto the bar with her left hand and holding her purse down with her right hand.

In view of this evidence, this court cannot say that the jury was not justified in believing that the handle bar was locked before the car in which plaintiff was riding had started.

The evidence did not sufficiently prove any imperfection or wrong on the cars, rails or track. An inspector for the city of Chicago testified that he found nothing wrong with the device at the place of the accident nor found anything wrong with the cars. This witness testified that "from tests he had made that the cars are designed to give the greatest degree of safety that it is humanly possible to give in a ride of this kind." The jury could properly find that the defendant was guilty of no negligence with reference to the construction, maintenance and operation of the railway, car and its appliances.

It is perhaps unnecessary to determine whether or not the accident was occasioned by the contributory negligence of plaintiff. The most plausible explanation is that she attempted to raise herself from the seat with an insufficient grip on the handle bar. When persons contract for a ride on these devices, such as are commonly in our amusement parks, they do so with the knowledge that there is more or less danger in the experience. That is one of the sources of attraction. When one does submit to such an experience, he must adopt that conduct which under the circumstances seems less likely to result in harm. One's own carelessness added to the inherent danger of the device is almost certain to result in an accident. What this court has said in Murphy v. White City Amusement Co., 242 Ill. App. 56, with cases there cited, is applicable to the present situation.

Complaint is made of the court's rulings on instructions. The criticisms made are of a very technical nature and suggest points

In view of this evidence, the court decided that the jury was justified in believing that the boards had been locked before the car in which plaintiff was riding had started.

The primary duty of a railway company towards its passengers or guests on the cars, while or there, is to exercise the utmost care of diligence to provide that the local railway company with the cars, at the place of the accident was local negligence along with the cars. This clearly implied that there could be a case that the cars may explain in view the reasonable degree of security that is humanly possible be given in a view of this kind." The jury could properly find that the defendant was guilty of an negligence with reference to the construction, maintenance and operation of the railway, car and its appliances.

It is perhaps necessary to reproduce evidence of our one accident was concerned by the counsel whose importance of relevant. The most plausible explanation is that the attempted to point out-self from the same side on transferring grip on the handle bar. Then persons constant for a ride on these trains, such is the commonly in our experience series, they do in fact the passenger that there is more or less danger in the experience. This is not a new method of attempted. Then may also sometimes it such an experience, he may accept this without doubt the [illegible] to result in [illegible]. [illegible] the injurious damage of the jurors is [illegible] to result in an [illegible]. that this course has held in [illegible] v. [illegible] 243 III. 490, 90, with which there [illegible], is analogous to the present situation.

Counsel is aware of the court's views on instructions. The criticism made by it a very technical nature and [illegible] points

which would not be likely to occur to a layman. We can see nothing in the instructions given which would have a tendency to mislead the jury in arriving at its verdict. The instruction offered by plaintiff and refused to the effect that plaintiff was not bound to prove his case beyond a reasonable doubt but merely to prove it by a preponderance of evidence, might properly have been given, (Consolidated Traction Co. v. Schritter, 222 Ill. 364,) although it has been held in E. J. & E. Ry. Co. v. Lawlor, 229 Ill. 621, that an enumeration of the things which the law does not require is in the nature of an argument to the jury and of doubtful propriety. The ninth instruction given on behalf of the defendant properly told the jury that plaintiff was required to establish his case by a preponderance or greater weight of the evidence. When one instruction covers the ground, it is not error to refuse to give another instruction covering the same ground. Daubach v. The Drake Hotel Co., 243 Ill. App. 298.

Upon the entire record we cannot say that the verdict was clearly against the weight of the evidence and the judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

which would not be likely to occur in a jurisdiction in which one sees conflicts in the instructions given which would have a tendency to mislead the jury in applying the evidence. The instruction offered by plaintiff was defective in the refusal that plaintiff was bound to prove his case beyond a reasonable doubt before he could be entitled to a verdict, and also, by a preponderance of evidence, which necessarily have been given (Consolidated Traction Co. v. Hollingsworth, 53 N.J. Law, 268), although it has been held in Ely v. Thompson, 10 Conn. 99 (1833), that, in an action for damages for the death of a person, the jury may not be required to be satisfied beyond a reasonable doubt of the existence of the facts upon which they base their verdict, as in a matter of an accident to the jury and of criminal prosecution. The which instruction given on behalf of the defendant properly told the jury that plaintiff was required to establish his case by a preponderance or greater weight of the evidence. Then the instruction covering the ground, it is not error to refuse a further instruction covering the same ground. Lawson v. The State, 52 N.J. Law, 431.

Upon the entire record we cannot say that the verdict was clearly against the weight of the evidence and the judgment is therefore affirmed.

For affirmance,

O'Connor, J., Ver. and Parker, JJ., 6.

For reversal,

None.

32964

137 A

OVERIA BARRINGER, Individually and as Administratrix of the Estate of PHILLIP BARRINGER, Deceased,
Plaintiff in Error,

vs.

PATRICK J. COLLINS, MARY J. COLLINS, THOMAS E. RYAN, Administrator of the Estate of Katie E. Harris, Deceased, and J. H. PERKINSON,
Defendants in error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

252 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was complainant and cross-defendant in a proceeding in chancery which involved a controversy between the heirs of Phillip Barringer and Katie Harris Barringer with reference to certain real estate in Cook county, Illinois.

The complainant in her amended bill alleged that Phillip Barringer in his lifetime was a joint purchaser with Katie Harris of certain of this real estate; that up to the time of his death Phillip Barringer paid half of the payments on the purchase price and that subsequent payments were made from the income derived from the property purchased. The bill prayed for an accounting and adjustment of the rights of the parties and partition of the premises. Defendants answered, denying the equity of the bill and filed a cross-bill praying that complainant should be decreed to have no interest whatsoever in this real estate.

The cause was put at issue and referred to a master. Pending the proceedings before the master an order was entered that complainant deposit $200 with the clerk of the court to secure payment of the costs of reference. Complainant did not comply with the order, and a further order was thereafter entered that she should be barred from offering any evidence before the master.

The master reported, finding that Phillip Barringer did not pay any of the purchase money agreed to be paid under the

terms of the contract; that he did not perform or keep any of the covenants or agreements provided in and by the contract, and that as a matter of fact all of the money which was paid on account of said purchase and under said contract was paid by Katie E. Harris, deceased; that at the time of the death of Katie E. Harris she had paid to Patrick J. and Mary Collins, the vendors of the real estate in question, the sum of $4500 principal and $1608 interest, on account of the purchase of these premises. The master further reported that complainant, individually and as administratrix, and the unknown heirs of Phillip Barringer had no right, title or interest in or to the premises or in or to the contract described. The master recommended that the bill of complaint should be dismissed at complainant's costs for want of equity, and found that all the material allegations of the cross-bill had been proved, and that the equities were with the cross-complainant. Complainant filed objections to the report which were over-ruled by the master, but no exceptions were filed before the chancellor.

Complaint is made of the order barring complainant from offering evidence on account of her failure to comply with the previous order, which required her to deposit costs with the clerk of the court. So far as the record shows, she did not object at the time this order was entered, but now contends that the statute under which the chancellor proceeded (see Section 34, chapter 53 of the Ill. Rev. Stats.) is unconstitutional. If complainant desired to raise a constitutional question, her writ of error should not have been sued out in this court.

It is also urged that the decree is not warranted by the evidence, but as there are no exceptions to the master's report, these questions of fact cannot be raised for the first time in this court. Foster v. Van Ostern, 72 Ill. App. 307; Johnson v. Voudris,

233 Ill. App. 572; Marble v. Thomas, 178 Ill. 540.

For the reasons indicated the decree of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

33166

138 (7)

ARTHUR G. RATHJE,
Defendant in Error,

vs.

FANNIE HARRIS et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

252 I.A. 63

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants seek to reverse certain orders and a decree entered in proceedings brought in chancery to foreclose a trust deed given on May 21, 1926, to secure 30 notes of Fannie and David Harris for the aggregate sum of $25,000. The bill was filed October 28, 1926. The record is per praecipe and includes only the bill of complaint, an order appointing a receiver entered October 30, 1926, a decree of sale entered June 7, 1927, an order approving a master's report of sale and entering a deficiency judgment for $425.51 against Fannie and David Harris in favor of Arthur G. Rathje, complainant, and a further order entered the same day upon a report of a master, finding an indebtedness from Fannie and David Harris to Clara Gruhn in the sum of $12,354; to Henry Scherer in the sum of $1065; to Rose Fox in the sum of $426; to J. L. Sadek in the sum of $532.30; and entering judgment in favor of the respective parties and against Fannie and David Harris for the amounts so found due.

The bill of complaint was in the usual form and alleged the execution of the notes and trust deed on May 21, 1926, upon which foreclosure was sought, default thereunder, and the execution by Fannie and David Harris of a subsequent deed to secure the payment of an indebtedness in the sum of $14,500 represented by 30 principal notes. The bill alleged the premises were improved by a building consisting of 5 stores, 7 apartments

and a public garage for the storage of automobiles; that there was a prior mortgage lien upon the premises superior to that of complainant's, upon which there was an unpaid balance of $90,000, and that the equity in the property was meager security for the payment of the indebtedness sought to be foreclosed. The owners and holders of the junior mortgage and their trustee were made defendants, as well as the trustee in the deed sought to be foreclosed and the unknown owners. The bill prayed an account might be taken, a receiver appointed and a decree of foreclosure entered.

The decree of sale recites that the cause came on to be heard upon the bill taken as confessed by the unknown owner or owners of the notes, and other defendants,(the answer of still others),upon a cross-bill filed by Edward W. and Amelia Reuter in which Clara Gruhn was subsequently substituted as cross-complainant, the several answers of cross-defendants Arthur G. Rathje, Oscar Horace and Louis Tomsik, and upon proofs and exhibits and the report of the master in chancery to whom the cause had been referred, which report and evidence heard by said master were filed therein, and "upon proofs heard in open court;" and it appearing to the court that the parties were properly before the court and that the court had jurisdiction of the subject matter and the parties, the report of the master was approved and a decree of foreclosure entered in accordance with its recommendations.

No briefs have been filed in behalf of the defendants in error.

Upon this meager record the defendants contend, first, that the order of July 2, 1927, directing the receiver to continue in possession of the premises, collect the rents, issues and profits of the building and to do all things necessary for the conservation of the premises, including the payment of taxes and

tax forfeitures, "interest and principal upon a first and prior encumbrance" on the premises, is erroneous because, they say, the purchaser at a foreclosure sale takes title with all its infirmities and burdens, and that a receiver has no right to apply the rents and profits accruing during the period of redemption in order to remove these infirmities and burdens for the benefit of the purchaser. In support of this proposition defendants cite Stevens v. Hadfield, 90 Ill. App. 405; Davis v. Dale, 15[illegible] Ill. 239; Stevens v. Hadfield, 76 Ill. App. 420; Standish v. Musgrove, 223 Ill. 500.

There is no question about the general rule as laid down in these cases. The order continuing the receiver, however, was purely interlocutory. It does not direct payment of any money in the hands of the receiver to any particular person, and if any such order to distribute funds is made in the future defendants will be entitled to present their objections and secure a final decree of the court in that regard. Moreover, neither the evidence which the record affirmatively shows was taken and filed by the master, nor the master's report are in the record. These would seem to be necessary to an adjudication of this contention in this court. In the absence of these, the presumption is of course in favor of the order.

It is next contended that the court erred in rendering a decree in favor of Scherer, Fox and Zadek, who, the brief avers, did not seek affirmative relief. Neither the cross-bill nor the report of the master was made a part of the record. In this state of the record we, of course, cannot ascertain whether there is any basis for the alleged error.

The same reason makes it impossible to sustain the third point for which defendants contend, namely, that the court was without jurisdiction to enter a supplemental decree.

It is further contended that the decree of sale was void

because it burdened the real estate with an encumbrance in the form of a lease which was executed subsequent to the trust deed foreclosures. The record, however, affirmatively shows that the owners of the equity consented to this lease and that it was executed at their request. They cannot be heard to argue error upon an order made at their own request. The other defendants have no standing to complain.

The meager record submitted hardly indicates an expectation that the assignments of error (which are not attached to the record) should be taken seriously.

The decree is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

because it had not the last finishing touch of [illegible] in the form of a large [illegible] extension to the [illegible] forbidding. The sound, however, [illegible] the ordinary of the people, [illegible] by the [illegible] expected at their [illegible]. They [illegible] upon an order [illegible] the [illegible]. The [illegible] have no [illegible] in [illegible].

The [illegible] expectation that [illegible] to the [illegible] to [illegible].

The [illegible] is [illegible].

O'Donnell, [illegible], [illegible], [illegible].

33174

KAROLINE SEIDEL et al.,
Defendants in Error,

vs.

MARGARET HOLCOMB et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

139 (A)

2

252 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was considered by this court upon a former writ of error, and the opinion of the court is reported in Seidel v. Holcomb, 249 Ill. App. 10. By that writ of error Margaret and Lee Holcomb and Charles E. Roland secured the reversal of a decree of foreclosure entered in favor of Karoline Seidel and Harold A. Fein, individually and as trustee.

The trust deed upon which the proceedings are based was executed by Margaret and Lee Holcomb on May 11, 1925, to secure an indebtedness in the sum of $18,000, evidenced by 58 notes, Nos. 1 to 56 inclusive, for $100 each, payable monthly; note number 57 for $2,000 and note number 58 for $10,000, payable 57 and 58 months after date with interest at six per cent per annum.

The bill to foreclose was filed on June 18, 1925, a little more than one month after the execution and delivery of the notes and trust deed. It was alleged that there had been defaults in the payment of premiums for fire insurance, in the payment of interest which had matured on a prior encumbrance and in the payment of note number 1 which fell due on June 11, 1925, - seven days before the bill was filed. On account of these defaults, the bill averred, the complainants exercised their option to declare the entire indebtedness and the interest thereon due and payable.

The record there disclosed that Karoline Seidel, complainant, was not the owner of the whole but of only a part of the

Lawrence Wilkes et al.,
motorcycle in Africa.

vs.

Lawrence Wilkes et al.,
Mineralia in Africa.

indebtedness secured by the trust deed, and her right as the owner of only a part to accelerate the maturity of the whole indebtedness by electing to declare it due was challenged. The opinion of this court quoted verbatim the provision of the trust deed with reference to an acceleration of the maturity of the indebtedness and, construing the same, said:

> "This court is of the opinion that the power here granted is to the holder of the whole of the indebtedness to the exclusion of the owner of any part thereof, and since the undisputed evidence shows that Karoline Seidel is not the owner of the whole but, on the contrary, the owner of only a part of the indebtedness, the finding of the master's report and the decree that she rightfully declared the whole amount due is not sustained by the evidence."

The record now before us discloses a decree in which the amount found to be due Karoline Seidel, complainant, indicates the theory of the Circuit court is that the order of this court should be construed to mean that Karoline Seidel, although the owner of only a part of the indebtedness, has the right to elect to accelerate the payment of that part of the whole indebtedness which is owned by her. It is difficult to perceive how the language of this court could be thus construed. It is distinctly stated in our former opinion that the power granted to accelerate is to the holder of the whole to the exclusion of the owner of any part of the indebtedness. This court, as numerous cases cited by defendants in error show, is bound by its former decision, which is res adjudicata as between these parties. Manufacturing Co. v. Wire Fence Co., 119 Ill. 30; Theological Seminary v. People, 189 Ill. 439; Torrence v. Shedd, 202 Ill. 498; Heimann v. Wilke, 219 Ill. 310; C. & E. I. R. R. Co. v. People, 219 Ill. 408; Prentice v. Crane, 240 Ill. 250; Village of Oak Park v. Swigart, 266 Ill. 60; Muhlke v. Muhlke, 285 Ill. 325; People v. Scanlan, 294 Ill. 64; People v. DeYoung, 298 Ill. 380.

As the decree of the Circuit court is not in conformity with the views expressed in the former opinion of this court, it is

indebtedness secured by the trust deed; but the right of the owner of only a part to accelerate the maturity of the whole indebtedness by electing to declare it due was recognized. The opinion of this court quoted verbatim the reasoning of the lower court with reference to an acceleration of the maturity of the indebtedness when construing the deed, said:

> "This [illegible] the owner of any part thereof, [illegible] the contrary, [illegible] declared [illegible] by the [illegible]."

The second case [illegible] in which the amount found to be due [illegible] upon the theory of the [illegible] that the [illegible] should be construed to mean that [illegible] part of the indebtedness, [illegible] the payment of that part [illegible]. It is difficult to [illegible] the language [illegible] thus construed. It is [illegible] that the power [illegible] the exclusion of [illegible] of the indebtedness. This case, as [illegible] the former decision, which is [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. Pennie, 190 Ill. 485; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. White, [illegible] Ill. [illegible]; [illegible]; Prentice v. Stover, [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. 60; [illegible] v. [illegible], [illegible] 64; People v. [illegible], [illegible] Ill. 150.

As the [illegible] with the views expressed in the former opinion of this court, it is

reversed and the cause remanded with directions to enter a decree conforming to the views expressed in this and the former opinion of this court.

REVERSED AND REMANDED
WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

33185

140

7

FRANK MALLICK,
Defendant in Error,

vs.

H. L. HAGERMAN, Doing Business as Hagerman Construction Company,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO

3

252 I.A. 639

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Mallick, plaintiff, brought suit on a promissory note dated March 16, 1927, due ninety days after date to his own order for the sum of $2,500. The statement alleged that the note was given for money loaned. The affidavit of merits denied the plaintiff loaned defendant $2,500 or gave other consideration for the note, and denied defendant made and delivered the note as alleged, or that any sum was due.

The cause was tried by the court without a jury. There was a finding for plaintiff in the sum of $2663.75 with judgment thereon.

Upon the trial the defendant offered evidence tending to show that he executed and delivered the note to a man named Young for the purpose of having it negotiated at the Triangle State Bank; that as first executed and delivered to Young the name of the payee was left blank; that Young brought the note back some time thereafter and told defendant to insert the name of plaintiff as payee, which defendant did, and again delivered the note to Young.

Plaintiff testified that all his negotiations with reference to the note were with one L. L. Lane; that at Lane's request plaintiff went to his own bank and pledged $4,100 worth of securities, thereby obtaining the sum of $2,250, which he turned over to Lane for the note.

Neither Young nor Lane testified on the trial, and the

rulings of the court on propositions of law indicate that the court did not believe defendant's story that he did not have knowledge of Lane's action, and considered Lane as in fact defendant's agent. We cannot say that the court was clearly and manifestly wrong in its finding on this issue of fact. However, either upon the theory that Lane was defendant's agent or upon the theory that where one of two innocent parties must suffer loss by reason of the wrongful act of a third person, the one who made the loss possible by his own negligence must bear the same, the finding and judgment of the court are in harmony with law and justice. McFadden v. Lynn, 49 Ill. App. 166; Patton v. Young, 233 Ill. App. 515; Bartlett v. First National Bank, 247 Ill. 490.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

[illegible]

[illegible]

O'Connor, [illegible], and [illegible], [illegible].

32196

VEMETA H. McBEATH,
Complainant and Appellee,

vs.

GEORGE McBEATH, WILLIAM McBEATH,
MARY McBEATH HILL, ELIZABETH McBEATH,
MATTHEW McBEATH et al.,
Defendants.

On Appeal of ELIZABETH McBEATH, MATTHEW
McBEATH and MARY McBEATH HILL,
Defendants and Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

252 I.A. 639

PER CURIAM: By her bill complainant sought a partition of certain real estate and also an accounting. A decree was entered in the Circuit court, from which certain defendants appealed. The cause went to the Supreme court, where it was held that the appeal did not affect the rights of any of the parties in or to the real estate in question, but related to matters of procedure and "to findings in the decree with reference to matters which do not affect any freehold interest." The cause was then ordered transferred to this court.

The only matters before us relate to the accounting and the question of solicitors' fees, but in the decree appealed from the accounting is reserved by the Circuit court for further order and the apportionment of costs and charges, including the question of fees for complainant's solicitors, was also reserved by the court for its further order. As there has been no final adjudication on the accounting or solicitors' fees it would seem that the present appeal is premature.

Defendants, however, assert that the decree improperly contains certain conclusions and findings which affect the rights of the defendants in the accounting and the apportionment of solicitors' fees. There seems to be merit in this claim; among the findings in the decree properly subject to criticism are the findings that the allegations in the bill of complaint as amended are true and

that the interests of all the parties were correctly and truly set forth in said bill of complaint as amended and that no substantial, meritorious or proper defense has been interposed and that the defense interposed has tended to unnecessarily delay said cause and to incur unnecessary costs and expenses. Nevertheless, we are disposed to adhere to the rule that a court of review will not consider a case piecemeal and that we should not determine the controversy until there has been a final decree both upon the accounting and the question of costs and solicitors' fees.

We shall therefore order the appeal dismissed, but with this suggestion - that the trial court in the accounting consider not only the evidence already taken but also any additional evidence which may be heard, disregarding as surplusage any findings or conclusions either in the present master's report or the present decree affecting the merits of the accounting or the question of costs and fees. If the cause should again be before us, we would consider it in this manner.

The appeal is hereby dismissed as premature without costs.

DISMISSED WITHOUT COSTS.

33049

144

A

EUGENE LEE, for use of
MORRIS FELDMAN et al.,
Appellants,

v.

JOHN RICKETTS, garnishee,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 610

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 24, 1927, a judgment by confession on a note or contract was entered against Eugene Lee for $54 in favor of Morris Feldman and others, trading as M. Feldman & Sons. After execution on the judgment had been returned nulla bona the Feldmans, by Abraham Feldman, on February 16, 1928, filed an affidavit for the issuance of a garnishee summons, returnable February 27th, against Ernest Ricketts and John Ricketts, doing business as Ricketts' Restaurant. According to the bailiff's return, service was had upon John Ricketts only. On the return day he was defaulted and a conditional judgment for $54 entered against him, as garnishee, and a writ of scire facias ordered to issue. This writ was made returnable on March 15th, and according to the bailiff's return it was served upon John Ricketts on March 12th. On the return day (March 15th), he not appearing, final judgment for $54 was rendered against him as garnishee. Thereafter execution was served upon him and on May 15, 1928, he appeared and moved that both the conditional and the final judgment be vacated, supporting his motion by a verified petition. There was a hearing upon the motion on May 24, 1928. Ricketts was given leave to amend his petition on its face, which he did by making an additional

allegation, and, after evidence had been introduced by Ricketts and after the Feldmans' motion for leave to answer the petition had been denied, the court ordered that both the conditional and final judgments be vacated and that Ricketts be discharged as garnishee. The Feldmans have appealed from the order. No brief has been filed in this appellate court by Ricketts.

In the petition as amended Ricketts alleged in substance that the first knowledge he had that final judgment had been rendered against him was when he was served with an execution; that the writ of scire facias had not been personally served upon him; that the conditional and final judgments are void because Eugene Lee is a "wage earner" employed by him and "is the head of a family living with the same," and because the statutory requirements as to the written wage demands, to be served on said Lee and said garnishee as employer before the bringing of the suit, were not complied with. These allegations were sustained by evidence introduced by Ricketts on the hearing. No contrary evidence was offered by the Feldmans. From the written wage demand, dated February 16, 1928, it does not sufficiently appear that it was served upon Lee, the wage earner, in compliance with the provisions of section 14 of the Garnishment Act (Cahill's Stat. 1927, Chap. 62, p. 1360), or within apt time; nor does it appear that any such demand was properly served upon Ricketts, the employer. It was not served personally upon him, but it appears that the demand was left with "cashier" at Rickett's usual place of business, but who the cashier was is not mentioned. It is provided in said section of the statute that "any judgment rendered without said demand being served upon the employe, and so proven and filed as aforesaid shall be void." We cannot agree with the contention of counsel for the Feldmans that the evidence on the

allegation, and, after evidence and [illegible] by [illegible] and after the Feldmans' [illegible] to vacate the [illegible] had been denied, the court ordered that both the [illegible] and final judgments be vacated and that [illegible] be [illegible] in premises. The Feldmans were ejected from the [illegible]. No brief has been filed in said appellate court by [illegible].

In the petition to vacate [illegible] alleged in substance that the first knowledge he had of said final judgment was when garnish-ed against him was when he was served with the [illegible]; that the writ of [illegible] had not been personally served upon him; that the conditional and final judgment [illegible] because he is a "wage earner" employed [illegible] of a family living with the same," and because the [illegible] requirements as to the written wage demand, to be served [illegible] with such garnishee by employer before the [illegible] was not complied with. These allegations were [illegible] by [illegible] at the hearing. No [illegible] was offered by the Feldmans. From the written wage demand, [illegible] 21, 1938, it does not sufficiently appear that it was served upon [illegible], the wage earner, in compliance with the provisions of section 14 of the Garnishment Act (Cahill's Stat. 1937, chap. 62, p. [illegible]), or [illegible]; nor does it appear that any such [illegible] was properly served upon [illegible], the employer. It was not served personally upon him, but it appears that the demand was left with [illegible] at [illegible] usual place of business, but who the [illegible] was is not mentioned. It is provided in said section of the statute that "any judgment entered without said demand being served upon the employer, and the proven and filed as [illegible] shall be void." [illegible] agree with the contention of counsel for the Feldmans that the evidence on the

hearing did not sufficiently show that Lee, the wage earner, resided with his family. Nor can we agree with counsel's further contention that the court erred after Rickett's evidence on the hearing had been introduced, in refusing to postpone the hearing and give the Feldmans leave to answer Ricketts' petition.

Our conclusion is that the court's order appealed from, vacating both the conditional and final judgments against Ricketts and discharging him as garnishee, was proper, and it is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

33058

145

a

PETER ZONCA and
PETRONELLA ZONCA,
Appellees,

v.

JOHN JANKOWSKI,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

252 I.A. 640

MR. PRESIDING JUSTICE CRINLEY DELIVERED THE OPINION OF THE COURT.

On July 27, 1927, plaintiffs commenced an action in case against defendant, claiming damages in the sum of $7500. The summons was made returnable to the September term of the Superior court. On August 22nd, defendant, an attorney-at-law, filed his appearance. Plaintiffs did not file their declaration until September 23rd. The negligence charged was in substance that defendant, retained as an attorney or solicitor to defend plaintiffs in a chancery suit brought against them in 1921, so carelessly and negligently managed the suit that a default decree was entered against them and they were obliged to pay out large sums of money, etc. Defendant failed to file any plea to plaintiff's declaration by October 7, 1927, and on that day plaintiffs' attorney voluntarily appeared before Judge Lewis, one of the judges of the Superior court, and obtained an order defaulting defendant for want of a plea. On October 25th, within the same term of court, defendant after notice filed a motion, supported by affidavits, to set aside the default and to be allowed to file pleas <u>instanter</u>. The court (Judge Lewis) granted the motion and defendant filed the pleas. On January 17, 1928, the cause, being on Judge Lewis' calendar, was

called for trial, and, plaintiffs failing to appear, the court dismissed it for want of prosecution on motion of defendant's attorney.

After several terms had passed, plaintiffs by their attorney on April 25, 1928, under section 89 of the Practice Act, appeared and moved that the order of January 17, 1928, dismissing the cause, be set aside. Accompanying the motion was a petition, sworn to by their attorney, Morris K. Levinson, in which, after making certain allegations, he prayed that said order of dismissal be vacated "because of the error and misprision of the clerk of said Judge Lewis' court." Subsequently the motion was heard by Judge Lewis, and during the hearing Levinson, on behalf of plaintiffs, filed an amended petition to which defendant filed a verified plea or answer. On May 26, 1928, the court (Judge Lewis) entered a draft order in which are recitals that the motion was considered upon plaintiffs' amended petition, defendant's answer thereto and arguments of counsel; that it appears that "this cause was regularly assigned on the printed calendar of this court to Judge M. L. McKinley;" and that "through an error" the cause "was placed on the call of the undersigned on January 17, 1928, and dismissed for want of prosecution." And the court ordered that "said order of January 17, 1928, dismissing said cause for want of prosecution be vacated and set aside and this cause is hereby reassigned to Judge M. L. McKinley for trial."

From this order, setting aside the dismissal order of January 17, 1928, the present appeal is prosecuted. In the bill of exceptions it is stated that, on the hearing of the motion, while Judge Lewis considered the allegations contained in the amended petition and in defendant's answer thereto, "no evidence was heard by the court."

called for trial, and, plaintiff's failing to appear, the court dismissed it for want of prosecution on motion of defendant's attorney.

Then matters stood for years. Plaintiff's new attorney on April 6th, 1931, moved against it at the trial term but, appeared and moved that the suit be dismissed for, inter alia, the cause, at his peril. Accordingly the matter was a pleading, moved to by this attorney, Louis C. Cassman, in which, after making certain allegations, he prayed that such order of dismissal be vacated "because of the error and misconduct of the clerk of said Judge Davis' court." Accordingly the motion was heard by Judge Davis, and during the hearing Cassman, on behalf of plaintiff, filed an amended petition in which Cassman filed a written plea or answer. On May 5th, 1931, the said Judge Davis entered a draft order in which are contained, when the motion was considered upon plaintiff's amended petition, Cassman's answer thereto and argument of counsel; that in answer thereto "this case was regularly assigned on the jurisdiction calendar of this court to Judge D. L. McEllhenny" and that "through an error, the order was given on the call of the mandatory calendar on January 17, 1930, and dismissed for lack of prosecution." And the court ordered that "motion of January 19, 1931, dismissing said action for want of prosecution be vacated and the cause put back on the jurisdiction calendar of Judge D. L. McEllhenny for trial."

From this order, noting the dismissal order of January 17, 1930, the defendant appealed to prosecution. In the bill of exceptions it is stated that, on the hearing of the motion, while Judge Davis examined the only three witnesses in the amended petition and in defendant's answer thereto, "no evidence was heard by the court."

In plaintiffs' amended petition, verified by Levinson, it is alleged that when the cause was commenced on July 27, 1927, it "was regularly assigned" to Judge M. L. McKinley (another judge of the Superior court) and appears on the printed calendar of the clerk of the court "as Calendar No. 9, Judge McKinley, as No. 773 thereof;" that on October 7, 1927 "affiant procured the files herein from the clerk for the purpose of entering defendant's default;" that "across the top of the file wrapper the clerk had placed an ink notation, viz,'No.7,' and affiant took the files to Judge Lewis, who then and there was calling calendar No. 7, and affiant permitted said order of default to be entered," which was thereafter vacated on defendant's motion; that "it was through affiant's error in failing to check up said printed calendar No. 9 with the said ink mark notation on the file wrapper, which read 'No. 7,' that induced affiant to have said default order entered before Judge Lewis." The petition then sets forth Rule 2 of the Superior court, which in part provides that the clerk of the court "will, at the close of each day's business, distribute in rotation among the judges, who have common law calendars, the common law causes begun on such day, * * and will place upon the wrapper of each case the number corresponding to the judge to whom the same is assigned." It is further alleged in the petition that in April, 1928, "an investigation was made by affiant, who found that the case, through some error, was dismissed by Judge Lewis on January 17, 1928;" and that "the case was, through error, placed upon the call of Judge Lewis and in violation of the rules of the court."

In defendant's plea or answer, verified by his attorney, Elmer M. Leesman, it is alleged that "it is not the fact that the cause was assigned to Judge Lewis through any error or misprision of the clerk, * * or that said number '7' appeared across the top

In plaintiffs' amended petition, verified or interrogatories, it is alleged that when the crime was committed on July 27, 1929, it "was regularly assigned" to Judge X. X, [illegible] presiding judge of the "superior court, and appears on the minute docket of the clerk of the court "as defendant No. 9, [illegible], on p. 72 thereof;" that on October 7, 1929 "defendant appealed the final decision from the clerk for the purpose of quashing defendant's indictment; that "across the top of the file [illegible] the phrase on ink motation, viz,'No.7,' he affiant took the file to Judge Davis, who then and there was sitting [illegible] No. 7, and affiant particularly said order of dismiss to be entered," which [illegible] verbally as defendant's motion; that "it was [illegible] affiant's error in failing to check up said printed minute, No. 7 with the pen ink mark motation on the file wrapper, which read 'No. 7,' have prompted affiant to have said Bennett enter another order [illegible]." The petition then [illegible] of the superior court, which in part provides that the clerk of the court "file, [illegible] of such city, [illegible] who have cause for complaint, the [illegible] day, [illegible] and file upon the docket [illegible] the number [illegible] to the judge to [illegible]." [illegible] Turner alleged in the petition [illegible] 1929, the transcription was made by affiant, and [illegible] the order, [illegible], was dismissed by Judge Davis on January 27, 1929;" and that "the order was, therefore, erroneously placed upon the [illegible] docket in violation of the rules of the court."

In defendant's plea or answer, verified by the attorney, Jerry W. Leonard, it is alleged that it is true that the case was [illegible] to Judge Davis [illegible] of the clerk, [illegible] "[illegible] across the top

of the file wrapper by any error or misprision of the clerk, but this defendant avers that said number '7' was written thereon by the clerk at the time the suit was started on July 27, 1927, and in accordance with Rule 2 of this court." After setting forth said Rule 2 and also Rule 24 of the court, which provides in part that "printed trial calendars will be made up for the September term each year, including all pending causes," it is further alleged that "said cause was later assigned to Judge McKinley in accordance with Rule 24;" that on October 7, 1927, when defendant's default for want of an appearance was entered by Judge Lewis, said Levinson, as plaintiffs' attorney, voluntarily took the files to Judge Lewis' court and applied for said default; that, when on October 25, 1927, Judge Lewis set aside the default on defendant's motion, Levinson was present and requested that the cause be set down on Judge Lewis' trial calendar for a day certain, but that the judge refused to do this and told the attorneys, including Levinson, that he would place it "on his trial call to be reached in its regular turn;" and that thereafter defendant's attorney, or his assistants, watched from day to day the progress of Judge Lewis' calendar and, after the cause had appeared for several days on the trial call, it finally was reached for trial, and, on motion of one of the assistants of defendant's attorney, neither plaintiffs nor their attorney having appeared, it was dismissed by Judge Lewis for want of prosecution.

After considering what is contained in the present transcript we are clearly of the opinion that the court's order of May 26, 1928, appealed from, wherein the order of January 17, 1928 (dismissing the cause for want of prosecution) was vacated and set aside, is erroneous and must be reversed.

In the recent case of McCord v. Briggs & Turivas, 249 Ill. App. 516, the first division of this appellate court, after reviewing many decisions of the Supreme court of this State, said

(p. 530): "We think this review of authorities discloses that errors which can be corrected by motion under section 89 are only such errors of fact as go to the capacity of the parties or misprision of the clerk of the court which do not contradict the record and which if known to the court would have prevented the entry of the judgment." We fail to find in the present case, such an error of fact, or any misprision of any clerk of the court, as warranted the court's order appealed from. In plaintiff's petition it is charged that "the case was, through error, placed upon the call of Judge Lewis and in violation of the rules of the court." Even if this be so, it has several times been decided that a violation of a rule of court is not such an error of fact as may be remedied under section 89 of the Practice Act, but is an error of law. (McNulty v. White, 248 Ill. App. 572, 578; Loew v. Krauspe, 320 Ill. 244, 249.) Furthermore, it appears in the present case that on October 25, 1927, (when defendant's default, voluntarily procured by plaintiffs' attorney, was set aside) plaintiffs' attorney was given notice by the court that the case soon would appear for trial on Judge Lewis' trial call, and that he failed to watch the progress of that judge's calendar and was not present when the case finally was reached for trial and the dismissal order was entered on January 17, 1928. It has frequently been decided that section 89 of the Practice Act is not intended to relieve a party from the consequences of his own negligence or that of his attorney. (McNulty v. White, 248 Ill. App. 572, 577; Jacobson v. Ashkinaze, 249 Ill. App. 479, 484; Cramer v. Commercial Men's Ass'n, 260 Ill. 516, 521; Loew v. Krauspe, 320 Ill. 244, 250.)

For the reasons indicated the order of May 26, 1928, setting aside the dismissal order of January 17, 1928, is reversed.

REVERSED.

Scanlan and Barnes, JJ., concur.

(p. 130): "It is also well settled that a judgment for injunction that errors which can be corrected by motion under rule 1 [illegible] may such errors of fact in giving the verdict, or in the [illegible] or misprision of the clerk of the court which is not [illegible] the record and which if known to the court would have prevented the [illegible] of the judgment. It will be seen in the opinion quoted, that the error of fact, or any misprision of the clerk in the court, [illegible] without the court's knowledge [illegible] it is charged that "the [illegible] [illegible] call of judgment [illegible] even if this is so, it has [illegible] [illegible] of a rule of court in [illegible] [illegible] under section 19 of the [illegible] [illegible] (Hoxsey v. [illegible], [illegible] [illegible] v. [illegible], [illegible] 111, 114, 124; [illegible] [illegible] on October 19, 1927, [illegible] [illegible] cured by plaintiff's attorney, [illegible] [illegible] was given notice by the [illegible] [illegible] trial on judge [illegible] [illegible] progress of that judge's [illegible] [illegible] finally was reached [illegible] on January 17, 1928. [illegible] of the [illegible] [illegible] consequences of his [illegible] [illegible] v. [illegible], [illegible] [illegible] Ap., 479, 484; [illegible] v. [illegible], [illegible] [illegible] v. [illegible], 32 [illegible] 124, 126.)

For the reason [illegible] [illegible] [illegible], [illegible] [illegible] the dismissal order of [illegible] 17, [illegible], is reversed, [illegible].

[illegible] and [illegible], [illegible], concur.

33076

PAUL SCHULTE,
Appellant,

v.

JOSEPH BRISTOW, Jr.,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

252 I.A. 610

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 31, 1917, the parties, both residents of Oak Park, Illinois, entered into a written agreement to form a partnership for the purpose of conducting a general real estate business in Oak Park, which business was conducted until January 23, 1920. On January 17, 1923, Schulte filed an amended bill against Bristow for an accounting, etc. After answer filed the cause was referred to a master in chancery to take proofs and report his conclusions of law and fact. Much evidence, oral and documentary, was introduced before the master. In his final report, filed February 28, 1927, after making many findings and stating the account, he reported that Schulte was indebted to Bristow in the net sum of $1329.93, and recommended that a decree be entered accordingly. To the report, as originally drafted, both parties filed objections. Some were sustained and the original draft of the report changed accordingly, and all other objections were overruled, which, subsequently, were ordered to stand as exceptions before the court. After a hearing upon the exceptions the court, on June 28, 1928, entered the decree in question. After finding that the parties were entitled to have an accounting and that a full and complete accounting had been had, the court adjudged

that all exceptions to the master's report be overruled, that it be approved and confirmed in all respects and that Bristow recover from Schulte the sum of $1329.93. The court also adjudged what amounts of the charges of the master and the court reporter should be paid by the respective parties. From this decree Schulte has appealed, assigning fifteen errors. Bristow has assigned cross-errors to the effect (a) that the value of certain insurance renewals should have been charged against Schulte, and (b) that the value of the good will of the business, which Schulte retained after the partnership ended, should be accounted for.

In the agreement it was provided inter alia that the parties should become partners, under the name of Schulte & Bristow, in the business of real estate, loans, insurance, buying and selling of properties, renting and managing of properties, etc.; that the business should be carried on in Oak Park in the store theretofore occupied by Schulte; that the partnership was to commence on January 2, 1918, and to continue for three years; that Bristow had contributed in lieu of cash the appliances and equipment of his office on Harrison street, Oak Park, together with the good will of his business, previously maintained under the name of Joseph Bristow & Co., and that Schulte had contributed the lease of his said store, his office appliances and equipment, and the good will of his business, all of which was estimated by the parties "at the like sum of $2,000;" that the capital so formed was to be used for the support and management of the new business; that at all times each party should give his attendance and use his best endeavors to advance the business; that all overhead and running expenses (other than the rent, lighting and heating of the store or office to be paid by Schulte, individually) should be borne equally by the parties; that all gains and profits should be divided equally and all losses borne equally; that full and correct

books of account should be kept, to which each party should have access; that once a year, on December 31st, or oftener if necessary, an accounting should be had and a settlement between the parties made; and that at the end of the agreed period of three years, or sooner determination of the partnership, there should be a final accounting and settlement.

In his report the master found that prior to the signing of the agreement Schulte was the owner of a number of apartment buildings, from which he collected rents, and was also the owner of much unimproved real estate which he placed on the market from time to time; that, prior to January 1, 1918, he had sold many pieces of property, on contracts on which monthly payments were to be made by the purchasers, and that his monthly receipts therefrom, and from rents received from other property owned by him or by clients for whom he acted as collecting agent, amounted to a large aggregate sum; that the partnership business did not actually commence until about February 1, 1918; that about February 2, 1918, Schulte left for California and was away from Oak Park for about two months during which time Bristow had exclusive charge of the business and kept the books; that before Schulte left he agreed to allow Bristow a salary of $125 a month; that Schulte did not limit the time during which this amount should be allowed to Bristow; that in the accountants' report, hereinafter mentioned, Bristow is charged back with $125 a month from January 1, 1919, up to December 31, 1919, which had been credited him on the partnership books as a salary; that Schulte, during the existence of the partnership, also was absent on his own business from January 1, to May 23, 1919, and also during the months of July and August, 1919, during which times Bristow alone conducted the business; that during the entire existence of the partnership Bristow

books of account should be held, in which case they should have
assessed that more a [illegible] of [illegible] life, or whether it [illegible]
an accounting should be had and [illegible] between the parties
under one ship to the one of the [illegible] period of three years, or
longer determination of the partnership, there should be a final
accounting and settlement.

In his report the master found that prior to the [illegible]
of the partnership [illegible] was the owner of a number of apartment
buildings, free with no mortgaged [illegible], and was also the owner of
much outstanding real [illegible] which he placed on the market from time
to time; that prior to January 1, 1929, he had said many pieces of
property, on contracts on which monthly payments were to be made by
the purchasers, and that his monthly receipts therefrom, and from
rents received from other property owned by him or by clients for
whom he acted as solicitor, amounted to a large aggregate; that
the partnership business did not actually commence until about
February 1, 1929; that about February 2, 1929, Schmidt left for
California and was away from New York for about two months during
which time Sakstein had exclusive charge of the business and kept the
books; that before Schmidt left he agreed to allow Sakstein a salary
of $150 a month; that Schmidt did not limit the time during which
this amount should be allowed to Sakstein; that in the accompanying
report, hereinafter mentioned, Sakstein is charged back with $150 a
month from January 1, 1929, up to December 31, 1929, which had been
credited him on the partnership books as a salary that month, during
the existence of the partnership, also was absent on his own business
from January 1, to Jan. 28, 1929, and also during the months of July
and August, 1929, during which times Sakstein alone conducted the
business; that during the entire existence of the partnership Sakstein

kept the books and was made responsible for the proper handling of all receipts and disbursements; that from the commencement of the business (February 1, 1918) Schulte permitted all his personal income (from rents, payments on contracts, etc.) to be collected by the partnership and put into its funds and duly credited on its books to him; that Bristow had no such personal income account; that at the close of the business for the first year, on December 31, 1918, there was an accounting and settlement between the parties and proper balances carried forward on the books at the commencement of the year, 1919; that the business continued all through that year, and up to January 23, 1920, when Schulte stated to Bristow that because of certain actions by Bristow he (Schulte) had decided to declare the partnership at an end; that at the time of the beginning of the partnership Bristow was instructed by Schulte as to the manner the latter desired the books to be kept and these instructions were followed; that during the year, 1919, both parties handled moneys received and both made disbursements in cash or by check; that shortly after the partnership was ended the parties and their attorneys had several conferences looking to a final settlement; that owing to the particular system or manner of keeping the books it was impossible to determine therefrom which of the partners owed money to the other; that by agreement a firm of accountants was engaged to make an audit of the books and the work subsequently was done by one Wallace Nolan; that according to the accountants' report there was due and owing from Bristow to the firm the sum of $1378.79, and that said firm owed Schulte the sum of $1355.54; that both parties objected to the report, claiming that it was incorrect in many particulars, and shortly thereafter Schulte commenced the present action; and that upon one

of the hearings before the master the parties agreed that the accountants' report, covering the period from January 1, 1919, to January 23, 1920, might be received in evidence, not as binding upon either party, but for the purpose of forming a basis for an accounting, and subject to be changed and modified as shown by evidence.

From the mass of evidence, oral and documentary, introduced at the hearings, the master further found that that portion of the accountants' report (wherein it was stated that there was owing from Bristow to the firm the sum of $1378.79, and that the firm owed Schulte the sum of $1355.54) was not sustained by the preponderance of the evidence; that certain errors were committed by the accountants in not giving credit to Bristow for eight enumerated items, aggregating $2,681.50; that there was more than $1355.54 due from the firm to Schulte, viz, $967.39 more, making an aggregate sum of $2,322.93 due to Schulte; but that, as against this aggregate sum, Schulte should properly be charged with nine enumerated items, aggregating $2,686.40. The master then states the account in full between the parties "as shown by all the evidence and documents in the case." This covers three pages of the abstract. And the master then concludes his findings by saying:

> "I, therefore, find that the complainant, Schulte, is indebted to the copartnership in the sum of $1737.04, out of which sum Bristow is first to receive the sum of $922.83, being credit balance due him, and the sum of $814.21 (being the difference between $1,737.04 and $922.83) should be divided equally between the parties. In other words, the complainant, Schulte, is indebted to the defendant, Bristow, in the sum of $1329.93."

After a careful review of the master's report, the lengthy briefs of opposing counsel and much of the evidence as contained in the printed abstracts, we are of the opinion that the chancellor did not err in confirming the master's report and in entering the decree appealed from. The case involves many questions of fact, as to which there was conflicting evidence. The stating of the account under the

conflicting evidence was a difficult task, and we are impressed with the care and attention given by the master to the work and to the evidence. We think that by the decree substantial justice has been done between the parties.

One of the items in the account which was allowed to Bristow by the master and confirmed by the court was that of $1595.32, - viz, a salary to Bristow from January 1, 1919, at the rate of $125 a month. The $95.32 of this item is the proportionate amount of such salary for the portion of the month of January, 1920, that the partnership remained in existence. It is strenuously contended by complainant's counsel that the allowance of this item was erroneous. We do not think so. It appears from the preponderance of the evidence that it was agreed by both parties that Bristow's account should be credited monthly with such a salary, and under the facts and circumstances in evidence it was proper that he should receive such a salary. Furthermore, such a salary was paid to him during the year 1918.

It is also contended that the court, following the master, erred (a) in allowing to the partnership a five per cent commission for collecting rentals on a large apartment building, owned by complainant in the year 1919, and which commission was paid to the partnership by one Schoneberger in 1918, when he was the owner of the building; (b) in crediting to the partnership certain profits (rather than only commissions) made on sales of certain properties made through the efforts of the members of the firm but which properties stood in complainant's name before said sales; (c) in crediting to the partnership commissions, at the rate of 5 per cent on sales of properties owned by complainant in violation of a verbal agreement, as claimed by complainant, that said commission charge should be only 2-1/2 per cent; (d) in not allowing a credit on complainant's account

qualifying evidence was a difficult task, and is not improper with the [illegible] given in the matter in her mind as to the evidence. In short, what by the [illegible] Jackson has been done between the parties.

One of the issues in the present action was raised in Dickson by the market manipulations by the [illegible] of [illegible] - viz., [illegible] in [illegible] rate of [illegible] a month. The [illegible] of this line is the [illegible] amount of [illegible] for the periods of the month of January, 1920, that the [illegible] complaint in [illegible]. It is [illegible] contended by [illegible] that the [illegible] of the time was [illegible]. It is not [illegible]. It [illegible] the [illegible] of the evidence that it was [illegible] the [illegible] of [illegible] accounts should be [illegible] [illegible] and where the [illegible] and [illegible] of [illegible] it [illegible] that [illegible] receive such a [illegible]. [illegible], with a [illegible] was paid to him during the year 1920.

It is also contended that the [illegible] the [illegible], extend (a) an allowance to the [illegible] a [illegible] for collecting [illegible] on a [illegible] [illegible], based by [illegible] in the year 1921; [illegible] [illegible] to the [illegible] by one [illegible] in 1921, [illegible] the [illegible] of the building; (b) in establishing in the [illegible] [illegible] profits (being that only [illegible] [illegible] of [illegible] [illegible]. Through the efforts of the [illegible] of the [illegible] the [illegible] [illegible] in complainant's [illegible] [illegible] (c) in [illegible] to the particularly [illegible]. (d) the [illegible] of [illegible] or [illegible] of [illegible] proportions made by complainant in [illegible] of a [illegible] [illegible], as claimed by complainant, [illegible] [illegible] should be only 4-1/2 per [illegible] (e) in not [illegible] a credit on complainant's account

with the partnership for his expenses on trips made by him to Florida and Montana; (e) in not allowing certain other credits to complainant as claimed by him; (f) in charging complainant on his account with the partnership for certain moneys which he had collected, belonging to it, and which, as he claims, he had previously turned in but was not given credit therefor on the books; (g) in making certain other erroneous charges as against complainant on his account with the partnership; and (h) in not charging Bristow's account with certain indebtednesses owed by him to the partnership. We have considered these contentions and are of the opinion that all are lacking in substantial merit.

And we do not think there is any merit in either of the two cross-errors assigned by Bristow, above mentioned.

For the reasons indicated the decree of the circuit court, appealed from, should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

with the protestants for his business on Tuesday next, so that to
florida and Kentucky; (2) not allowing certain other claims
to complainant as filed; (3) a decree accordingly
on his answer with the stipulation for certain amount under one he had
collected, bringing in it, and filed on the claims, and previously
filed in the [illegible] for the Tuesday (4) in
making certain other arrangements [illegible] in his
account with the [illegible] and (5) [illegible] Kentucky's
account with certain [illegible] by the [illegible].
I have a matter [illegible] in the claims in it
are invalid in substantial merit.

Let me in the [illegible] by [illegible] by the
two-cross-[illegible] filed by [illegible].

For the reasons [illegible] in the circuit court,
appeals from, should be affirmed, and it is so ordered.

[illegible].

Swanson and Dawson, [illegible] concur.

33085

147

A

JOHN ZIDEK,
Appellant,

v.

JOHN PODMAJERSKY,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 640

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In March, 1926, plaintiff, engaged in business as an undertaker, sued defendant to recover a balance of $686.40, claimed to be due for disbursements made and services rendered in August, 1925, in connection with the funeral and burial of Anna Forejt, daughter of defendant and wife of William Forejt. Plaintiff's total bill amounted to $1178.40, on which when rendered he had allowed a credit of $92, and on which in November, 1925, he was paid $400 by William Forejt, at the time the latter received said last mentioned sum from an insurance society of which the deceased in her lifetime had been a member. Plaintiff alleged in his statement of claim that defendant promised to pay for said disbursements and services. Defendant, in his affidavit of merits, denied that he was indebted to plaintiff in any sum, and alleged that he did not engage plaintiff's services, or order the disbursements which were made, but that his son-in-law, Forejt, did, and that Forejt, only, was liable therefor. On a trial without a jury, had in May, 1928, at which plaintiff was his only witness and defendant and several witnesses for him testified, the court found the issues against plaintiff and entered judgment against him for

83023

JOHN [illegible],
Appellant,

v.

JOHN [illegible],
Appellee.

Appeal from the Superior
Court of [illegible].

[illegible]

[illegible]

In [illegible], 1960, plaintiff, employed as [illegible] by an [illegible] contractor, sued defendant in a [illegible] to recover damages claimed to be due for [illegible] work and material furnished in August, 1959. In consideration of the [illegible] and [illegible] of some [illegible], defendant [illegible] and [illegible] plaintiff's total [illegible] in [illegible], [illegible] which [illegible] he had allowed a credit of [illegible]. [illegible], 1959, he was paid [illegible] by William [illegible], [illegible] said last mentioned was [illegible] [illegible] at which [illegible] discussed in [illegible] and [illegible]. [illegible] plaintiff in his statement of claim that [illegible] promised to pay [illegible] [illegible] and [illegible]. [illegible] in [illegible] [illegible] to [illegible], denied that he was [illegible] in [illegible], and claimed that he did not engage plaintiff's services, or even [illegible] [illegible] which were made, but that [illegible], [illegible], and that [illegible], only, [illegible], [illegible] a [illegible] [illegible] and [illegible] in July, 1959, [illegible] [illegible] [illegible] defendant and [illegible] [illegible] for the [illegible], the [illegible] found the issues against plaintiff and entered judgment against him [illegible]

costs. This appeal followed.

Plaintiff's main contention is that the finding and judgment are against the manifest weight of the evidence. We cannot agree with the contention. It was shown by a preponderance of the testimony that plaintiff rendered the services and made the disbursements under orders from Forejt, and that plaintiff recognized him and not defendant as the debtor. Defendant did not sign any writing or memorandum to the effect that he would be responsible for any disbursements made or services rendered by plaintiff.

The judgment should be affirmed and it is so ordered.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

cases. This appeal failed.

Dalsinity's main contention is that the trial judgment are against the manifest weight of the evidence. It argues with the contention. It was shown by a preponderance of the testimony that plaintiff received the written and more the disbursements under orders from Trudy, and that plaintiff received the and not delivered to the fiduciary. Defendant did not sign any writing or receipt to the effect that he would be responsible for any disbursements made or written receipts by plaintiff.

The judgment should be affirmed and it is so ordered.

Pearson and Brown, J.J., concur.

33106 - 33107

D. C. KETCHEM,
Appellee,

v.

TROY AND COMPANY,
a corporation,
Appellant.

E. H. McMICHAEL,
Appellee,

v.

TROY AND COMPANY,
a corporation,
Appellant.

CONSOLIDATED APPEALS
FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 25, 1927, the respective plaintiffs commenced separate first class actions in contract in the Municipal court of Chicago against Troy and Company, a corporation, L. J. Troy and Richard S. Morris. Ketchem's claim was $3425 and McMichael's $3600. By stipulation the cases were tried together before the court without a jury in June, 1928. Near the close of the trial, on plaintiffs' motions, each action was discontinued as to the individual defendants, Troy and Morris, each plaintiff filed an amended statement of claim, and the trial proceeded as to the remaining defendant, Troy and Co. On June 15, 1928, the court made separate findings of the issues against said defendant, and assessed Ketchem's damages at $3313, and McMichael's at $3259.82. Judgments were entered upon the findings and separate appeals were taken and here consolidated for hearing.

In Ketchem's amended statement of claim he alleged that on or about February 1, 1927, he entered into "an arrangement" with

defendant whereby he was to give his time and attention in doing promotional work in locating and procuring options on public utility and electric light plants in the State of Georgia; that he was to be paid his travelling and hotel expenses, etc.; that he did the work and disbursed for said expenses during the period from February 1 to June 30, 1927, the sum of $4125; that he received $700 from defendant on account; and that the net balance due is $3425. The allegations of McMichael's amended statement of claim are to the same effect except as to amounts.

In defendant's amended affidavit of merits to Ketchem's statement it denied that at any time it entered into any arrangement or agreement as alleged, or that Ketchem incurred the amount of expenses as claimed, or that defendant is indebted to him in any sum; alleged that such arrangement as was entered into was made on or about April 8, 1927, between defendant and "Ketchem and one L. H. McMichael jointly;" further alleged that Ketchem and McMichael, and defendant, "were to charge their reasonable expenses against a new operating company to be organized in which Ketchem and McMichael would have 51 per cent of the stock and defendant 49 per cent under certain circumstances which did not materialize, without fault on the part of defendant;" and further alleged that such payments as were made by defendant were "advances" made to Ketchem and McMichael "as temporary loans," to be accounted for by them in the adjustment to be made when the utilities were procured and the new company formed. Defendant's amended affidavit of merits to McMichael's statement is substantially the same.

On the trial Ketchem and McMichael testified and certain letters, telegrams, accounts and other writings were introduced. On defendant's behalf L. J. Troy, its president, testified, as did

defendant, whereby he was to give his time and attention to being promotional work in locating and promoting options on public utility and electric light plants in the State of Michigan; that he was to be paid his travelling and hotel expenses, etc.; that he did the work and disbursed for such expenses during the period from February 1 to June 30, 1927, the sum of [illegible] and received from defendant on account and that not taking day to time. The allegations of Westchester's counsel statement of claim are in the same effect except as to amounts.

In defendant's amended statement of defense to Westchester's statement it denied that at any time it became into any arrangement or agreement as alleged, or that Westchester incurred the amount of expenses as claimed, or that defendant is indebted to him in any sum; alleged that such arrangement as was entered into was made on or about April 6, 1927, subject to the approval of the Toronto and one H. Mackinnon Limited." The letter dated May 6, 1927 from Mackinnon and defendant, "were to charge their respective companies a fee of a new operating company, to be organized in which Mackinnon and Westchester would have 33 per cent of the stock and defendant 34 per cent. Under certain circumstances which did not materialize, Westchester was to the part of defendant's and further alleged that such payments were made by defendant with "Mackinnon" were in Mackinnon and Mackinnon "in temporary loans," to be repaid for by them in the "[illegible]" to be made when the [illegible] were produced and the company formed. Defendant's amended statement of defense to Mackinnon's statement is substantially the same.

On the trial Mackinnon was examined testified and evidence letters, telegrams, etc., [illegible] were introduced. On defendant's behalf he, [illegible], the president, testified, he did

Richard H. Morris, its secretary and treasurer, William O. Turrell, its bookkeeper, and Frank Black, an attorney. Defendant also introduced certain letters, telegrams and writings.

The corporation, Troy and Company, was engaged in the investment banking business with principal office in Chicago. L. J. Troy first met Ketchem in November, 1925, at Walton, Kentucky, when Troy purchased an electrical plant in which Ketchem was interested. In March, 1926, at another meeting, Troy suggested that Ketchem find in the south electrical plants that could be purchased, and that, if the properties proved satisfactory, arrangements profitable to both might be made. In the fall of 1926, Ketchem met McMichael and was informed that there were a number of such plants in the State of Georgia, and thereafter both inspected some plants. Early in January Ketchem met Troy in defendant's Chicago office, and, according to Ketchem's testimony, after Troy was informed as to the plants visited, Troy said that "if you now have enough money to finance yourselves, until you buy a plant in one town or make a minimum of $100,000, that is all the money you will need," and further said that "we (defendant) will refund all money expended by you during the promotional work, and, in addition, will give you a stock interest in the company to be formed, and whether it is 49 per cent or 51 per cent is immaterial to us." Troy's version of the interview, as disclosed from his testimony, is in substance that there was talk about the formation of a company to take over and manage such plants as might be purchased, as to defendant furnishing the money for the necessary payments and finding purchasers for bonds and securities to be afterwards issued, and as to what amount of stock of the new company defendant should have and what amount Ketchem and McMichael should have, but that nothing was said as to defendant paying, or agreeing to pay,

Richard C. Hertz, its secretary and treasurer; Clifton W. Terrell, its bookkeeper, and Frank Bland, an attorney. Defendant also introduced certain letters, telegrams and writings.

The respondents, Troy and Ketchum, are engaged in the investment banking business with principal office in Chicago. [illegible] Troy first met Ketchum in November, 1927, in Dayton, Kentucky, when Troy purchased an electrical plant in which Ketchum was interested. In March, 1928, at another meeting, Troy suggested that Ketchum find in the South electrical plants that could be purchased, and that, if the properties proved satisfactory, arrangements preliminary to which might be made. In the fall of 1928, Ketchum met [illegible] and was informed that there were a number of such plants in the State of Georgia, and thereafter went there to view plants. Early in January Ketchum met Troy in [illegible] Chicago office, and, according to Ketchum's testimony, after Troy was informed as to the plants visited, Troy said that "If you now have enough money to finance yourself, until you buy a plant in the name of [illegible] a minimum of $150,000, that is all the money you will need" and further said that "we (Investment) will refund all money expended by you before the promotional work, and, in addition, will give you a stock interest in the company to be formed, and whether it is of [illegible] or if any plant is [illegible] to us." Troy's version of the interview, as disclosed from his testimony, is in substance that there was talk about the feasibility of a company to take over and manage such plants as might be purchased, as he [illegible] the money for the necessary payments and [illegible] payments for bonds and securities to be afterwards issued, and as to what amount of stock of the new company Ketchum [illegible] should have and what amount [illegible] should have, but that nothing was said as to reimbursing Ketchum, or agreeing to pay,

the expenses incurred by Ketchem and McMichael while engaged in their promotional work. Troy further testified that at no time, in any subsequent conversations had with either Ketchem or McMichael, did he ever agree that their expenses incurred in promotional work would be paid by defendant. On March 12, 1927, defendant, by Troy, wrote Ketchem to Atlanta, Georgia, in part as follows: "Replying to your favor of March 10th, our working agreement was that you were to secure an option or buying contract on property, subject to our approval. * * If we are to buy properties here, we naturally demand the controlling interest. If you, however, take the responsibility of buying, we only to assume the financing, we are prepared to let you retain the control." On March 30, 1927, the City of Manchester, Georgia, entered into an agreement with Ketchem and McMichael, whereby it agreed to sell to them, or their assigns, free and clear of indebtedness, its electric light plant for $112,500. The agreement was subject to certain conditions, among which were that Ketchem and McMichael should within 15 days deposit in escrow with a named bank $5,000, to apply on the contract price, and that, if such deposit were made, the balance of the purchase price should be paid on or before June 30, 1927. The $5,000 deposit was paid about April 11th by defendant, but the balance of the purchase price never was paid nor the agreement consummated.

Shortly after the signing of this agreement, Troy and defendant's attorney, Frank Black, went to Atlanta and met Ketchem and McMichael. This was the first time that Troy had ever seen McMichael. Troy went to Manchester and inspected the plant, and expressed satisfaction as to it. Within a day or two all again met in Atlanta and there was a protracted conference. It was agreed that a Delaware corporation, named Georgia Central Electric Co., should be organized, which would take over the title to the Manchester

the expenses incurred by Ketchum and Robinson while engaged in their promotional work. Troy further testified that at no time, in any subsequent conversations had with either Ketchum or Robinson, did he ever agree that their expenses incurred in promotional work would be paid by defendant. On March 21, 1929, defendant, by Troy, wrote Ketchum at Atlanta, Georgia, in part as follows: "Replying to your favor of March 20th, our working agreement was that you were to secure an option or outright contract on property, subject to our approval. * * * If we are to buy properties here, we naturally demand the controlling interest. If you, however, take the responsibility of selling, we only to arrange the financing, we are prepared to let you retain the control." On March 25, 1929, the City of Manchester, Georgia, entered into an agreement with Ketchum and Robinson, whereby it agreed to sell to them, or their assigns, free and clear of indebtedness, its electric light plant for $112,500. The agreement was subject to certain conditions, among which were that Ketchum and Robinson should within 15 days deposit in escrow with a named bank $5,000, to apply on the purchase price, and that, if such deposit were made, the balance of the purchase price should be paid on or before June 24, 1929. The $5,000 deposit was paid [illegible] by defendant, but the balance of the purchase price never was paid and the agreement was terminated.

Shortly after the closing of this agreement, Troy and defendant's attorney, [illegible], went to Atlanta and met Ketchum and Robinson. This was the first time that Troy had ever seen Robinson. They went to Manchester and inspected the plant, and expressed satisfaction with it. Within a day or two all again met in Atlanta and there was a conference. It was agreed that a Delaware corporation, named Georgia Central [illegible], should be organized, which would take over the title to the Manchester

plant and such other plants as might be purchased, that Ketchem should be president and McMichael and Troy vice-presidents, and that Ketchem and McMichael jointly should have 51 per cent of the stock. On April 8th, Ketchem and McMichael signed and delivered to Troy a written memorandum, acknowledging that "Troy and Company are the owners of 49 per cent of the contract of March 30th, made for the purchase of the electrical properties of the City of Manchester, Ga., and that you (Troy & Co.) are to have a 49 per cent interest in such other utility properties as we may contract to purchase, provided you approve of such purchase." There was talk as to who should pay the travelling expenses and other promotional disbursements of Ketchem and McMichael and, according to the testimony of Troy and Black, it was agreed that these expenses and disbursements, as well as the disbursements made and to be made by defendant, "were to be gotten out of the new company to be formed," and that "both parties were to be paid their expenses out of the deal when it was completed."

On April 15th defendant, by Troy, wrote to Ketchem and McMichael, informing him that the work of organizing the new company was about completed, and saying, "I am hoping that you will fulfill your promise to me and purchase at least $250,000 worth of properties within the next 20 days." About this time Ketchem was negotiating for the purchase of another plant in the city of McRae, Georgia. On April 23rd he wired to Troy in part: "Am in extreme need of $1,000, and will greatly appreciate it if you can wire me that amount this morning as an advance on expenses." Troy, on April 25th, wired in reply in part: "Do not wish to advance any money for expenses until additional properties available. * * When in Georgia you assured me that you would close for some other properties

plants and such other objects as might be available, they thought should be provided and installed. We "Tory Rebels", in contrast, had also lostheir and confiscated property worth over [illegible] of the estate. On April 8th, Sullivan and Robinson signed the letter to Tory a written assurance, acknowledging that they had compromised the terms of the surrender of the district of South Carolina, made for the purchase of the aforesaid properties in the city of Charleston, Ga., and that the Tory's had no claim to any of the same interest in such other military properties as we may consider to purchase, provided the terms of such purchase. There was only an to who should pay the travelling expenses and other pecuniary disbursements of Sullivan and Robinson, according to the testimony of Tory and Rebel, it was agreed that Tory should pay "Rebels" expenses, as well as the disbursements which had to be made by "Rebels", "were in the nature and of the new subject to be tested," and that "both parties were to be paid their expenses out of the land when it was completed."

On April 11th following, by Tory, [illegible] and Wallaby, informing him that the work of supplying the new company was almost completed, and saying, "I am hoping that you will fulfill your promise to me and produce to Tory's [illegible] of properties within the next 30 days." Note that the rebels are negotiating for the purchase of similar place in the city of Tories, Georgia. On April 21st he wrote to Tory in part: "It is extreme need of money, and will greatly appreciate it if you can give me that amount this morning in an envelope or package." Tory, on April 25th, wrote in reply to part: "Do not wish to advance any money for expenses until additional properties available." [illegible] Then in Georgia you assured me that you would give for some other properties

within a week." On April 30th, the new company, Georgia Central Electric Co., was fully organized and ready to transact business, and on that day Troy, from Chicago, wired Ketchem, at McRae, of that fact, and that "you can now take contracts in the company's name," and that "when ready to take over properties and pay for same you will be obliged to come here and have all matters arranged here." On May 3rd an agreement was signed by the city of McRae and the Georgia Central Electric Co., "by D. C. Ketchem, purchasing agent," wherein the city agreed to sell its electric light plant, etc., to said company for $150,000, and the company agreed to deposit in escrow with a named bank within 15 days the sum of $5,000 in part payment, and further agreed to pay the balance of the purchase price on or before August 2, 1927. It was stipulated on the trial that the $5,000 deposit, was paid out of defendant's funds within the required time, but that the balance of the contract price never was paid and that the agreement was cancelled.

Shortly after the McRae agreement was signed Troy met Ketchem and McMichael at Atlanta and all went to McRae, and Troy inspected the plant. During the trip both Ketchem and McMichael several times asked that defendant or Troy make advancements to them for their promotional travelling and hotel expenses, but Troy refused to comply with the requests and said in effect that they must wait. Ketchem went to Chicago with Troy and, on May 14th, while in defendant's office, told Morris, defendant's treasurer, that he "was practically broke," and at that time Morris, as a loan or advancement from defendant, gave him defendant's check for $500. On May 24th, McMichael wired Troy in part: "Would appreciate an advance of $500 repayable when deal is closed: Wanted for expenses in travelling to purchase other properties." Defendant wired the $500 to McMichael at Atlanta on May 25th, and on the same day Troy

within a week." Dr. Lyell Smith, the new company, Portable Thermal Electric Co., was fully organized and ready to commence business, and on that day Troy, Tyrone Cleveland, Edith Stevens, or Edna, or that f'ed, and that "you can now take precedence in the company's name," and it's "whom really is both evil, degenerative and my for name you will be obliged to make been on their it matter, changed here." on May 3rd an agreement was signed by the city of Atlanta and the Georgia Thermal Electric Co., "y . . . Trolley, provisions agree," whereas the city agrees to sell its electric light plant, etc., to said company for [illegible], and the company agrees to dispose in equals with a bond issue [illegible] of the sum of $[illegible] in part payment, and further agreed to pay the balance of the purchase price on or before August 1, 1917. It was stipulated on the bond issue the $3,000 deposit, was paid out of [illegible]'s fund which the [illegible] time, but that the balance of the [illegible] price never was paid and that the agreement was cancelled.

Shortly after the Atlanta [illegible] the signal they had [illegible] and Portland in Atlanta and all used to Edna, and they inspected the plant. During the stay with Kirkham and Mathewson several times asked were attorneys or they were representing in lieu for their professional services the usual expenses, but Troy re- fused to comply with the requests and said in effect that they must wait. Lawyers work on [illegible] when they work, as we say here, while in Mathewson's office, this morning, Mathewson's [illegible], that he "was practically broke," and at this time morning, on a loan or misunderstanding from Kirkham, gave the defendants [illegible] on May 26th, Mathewson stated they in part "[illegible] expenses an advance of [illegible] when that is signed; [illegible] for expenses in travelling to purchase other properties." Mathewson wired the [illegible] to Mathewson at Atlanta on May 26th, and on the 6-8 day Troy

wired him in part: "Wired $500 to Robert Fulton Hotel, Atlanta, part payment expenses accrued purchasing properties in Georgia; we have large investment now in Georgia without means of liquidating until deal is closed when full settlement will be made." It also appears from the evidence that Ketchem received two further advancements or loans of $200 each from defendant during June, 1927. Ketchem testified that out of these amounts he gave $200 to McMichael.

On June 23, 1927, Ketchem and McMichael visited defendant's office in Chicago at Troy's request. Troy informed them in effect that defendant would not consummate either the Manchester or McRae agreement, that it would forfeit the two payments it had made on those agreements, and that it "could not go through with the deal." Defendant's books show that it had disbursed as expenses on the unconsummated deal the total sum of $18,885.86, that these expenses were charged to an account with the new company, Georgia Central Electric Co., opened in April, 1927, and that in December, 1927, said account was charged to profit and loss. Shortly before the beginning of the present actions demands were made upon Morris, defendant's treasurer, that defendant pay plaintiffs' respective claims for expenses, etc., but the demands were refused.

Substantially three grounds for a reversal of the two judgments appealed from are urged by defendant's counsel, viz., (a) that it appears from a clear preponderance of the evidence that there was no agreement made that defendant should pay or reimburse Ketchem and McMichael for their expenses, etc., incurred in the doing of the promotional work in question, and, hence, defendant is not liable in these actions in any sum; (b) that there is a defect of parties plaintiff, in that, assuming a liability on defendant's part for said expenses, such liability was to Ketchem and McMichael, jointly and not severally; and (c) that most of their charges for

wished him in prison." Plaintiff then on August fifteen ninety, nineteen, post payment expenses account processing processing in August so have large investment now in security clients stock of liquidating until deal in closed when full relationship with as same." It also appears from the evidence that between receiving the Trustee advance-ments of loans of [illegible] week from independent [illegible], [illegible] benefited that out of these accounts in [illegible] in Bakersfield.

On June 14, 1977, Trustee and Bankruptcy visited [illegible]'s office in Chicago at Trust's request. They informed them in strict that defendant would not [illegible] either the [illegible] or [illegible] agreement, that it would [illegible] the [illegible] is not made on those agreements, and that it "would see [illegible] with them."

Defendant's books show that it had [illegible] in expenses on the [illegible] that the total [illegible], that those expenses were charged to an account with [illegible] company, Marquis General Electric Co., opened in April, 1977, and [illegible] in December, 1977, said account was charged to [illegible] and loan. [illegible] before the beginning of the present [illegible] [illegible] [illegible], defendant's [illegible], they refused to [illegible] fraudulent claimsler expenses, etc., but [illegible] [illegible].

Nondischargability claims premised for a [illegible] of the two judgments appealed from are based by plaintiff's [illegible], viz., (a) that it appears from a close [illegible] of the evidence that there was no agreement made that defendant should pay or reimburse Fidelity and Guaranty for bonds [illegible], etc., incurred in the doing of the [illegible] work in question, and, hence, defendant is not liable in these actions in any event (b) that there is a [illegible] of [illegible] liability in fact, assuming a liability on defendant's part for such expenses, such liability was in fraudulent and willful, intentionally and not accidentally and (c) that most of their claims for

expenses, as contained in their separate accounts introduced in evidence, are not sustained by competent proof.

As to the first contention, after a careful review of the evidence, we are of the opinion that it is meritorious, and that defendant is under no liability as claimed. It appears that the arrangement or agreement was in substance that defendant on the one hand, and Ketchem and McMichael, on the other, should go into a joint venture or deal in which the parties should perform different parts; that Ketchem and McMichael should do promotional work in the endeavor to procure contracts for the purchase of electr light plants in Georgia; that defendant should arrange and pay for the incorporation of a new company, in which the parties should have certain agreed interests as shown and be directors and officers thereof, and which company should later take title to such plants as were purchased and thereafter operate the same; and that defendant should furnish the funds to make the necessary payments for the purchase of one or more such plants, and thereafter, after the new company had obtained title, negotiate its bonds, etc., secured on the plants, the proceeds from said bonds, etc., to be used as working capital for the new company. It further appears that both parties acted upon the agreement for a time; that Ketchem and McMichael visited and inspected numerous plants and disbursed from their personal funds in travelling expenses, etc., considerable sums of money; that through their efforts they procured contracts for the sale to them or to the new company of two plants in Georgia, which defendant's president thereafter inspected; that defendant caused the new company to be incorporated, with interests of the parties therein as agreed, and paid the expenses of the incorporation; that defendant also paid out of its funds the necessary "earnest money," aggregating $10,000, on said contracts, and also made other disbursements in promoting

the venture; that, subsequently, defendant decided either that it could not or would not proceed any further with the venture or de and that it never was consummated. Both Ketchem and McMichael testified that it was part of the agreement that their said promotional expenses sued for would be paid by defendant, rather than out of the funds of the new company after its formation. Troy's testimony and that of other witnesses for defendant is to the contrary and is corroborated by telegrams and other writings and by other facts and circumstances in evidence. Furthermore, the evidence clearly discloses that such moneys as were paid by defendant to either Ketchem or McMichael were in the nature of temporary loan or advancements for expenses and to relieve them from present financ embarrassments. Plaintiffs' claims are not for damages because of defendant's failure or refusal to finally consummate the venture or deal, but are based upon defendant's agreement, as they claim, that it would reimburse them for all their travelling expenses, etc., incurred in their said promotional work.

These holdings render unnecessary any discussion or decisio as to defendant's counsels' other two contentions above mentioned.

For the reasons indicated the judgment of June 15, 1928, for $3313, rendered against defendant and in favor of L. C. Ketchem is reversed.

REVERSED WITH FINDINGS OF FACTS.

Scanlan and Barnes, JJ., concur.

33106.

FINDING OF FACTS.

We find as ultimate facts in this case that defendant, Troy and Company, did not at any time promise or agree with plaintiff, J. C. Ketchem, that it would reimburse him for such travelling expenses, etc., as were incurred by him in the promotion of the joint venture or deal in question, and that defendant is not indebted to him in any sum for such expenses.

33107

149 A

E. H. McMICHAEL,
Appellee,

v.

TROY AND COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in appeal case No. 33106 (consolidated for hearing with this appeal case, No. 33107), the judgment for $3,259.82, rendered against the defendant, Troy and Company, and in favor of E. H. McMichael, in the Municipal Court of Chicago on June 15, 1928, is reversed.

REVERSED WITH FINDING OF FACTS.

Scanlan and Barnes, JJ., concur.

33107

FINDING OF FACTS.

We find as ultimate facts in this case that defendant, Troy and Company, did not at any time promise or agree with plaintiff, E. H. McMichael, that it would reimburse him for such travelling expenses, etc., as were incurred by him in the promotion of the joint venture or deal in question, and that defendant is not indebted to him in any sum for such expenses.

03107

[illegible]

[illegible]

[illegible]

33115

150 4

FRANK TRYSKO,
Appellant,

v.

M. KRENS,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

2

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries to plaintiff (as well as for property damage) caused by defendant's automobile colliding with plaintiff's automobile in, or south of, the intersection of Spaulding avenue and Flournoy street, Chicago, on the afternoon of October 24, 1926, the court, at the conclusion of all the evidence, instructed the jury to return a verdict finding the defendant not guilty. Upon such verdict being returned on May 8, 1928, the court entered judgment against plaintiff for costs and this appeal followed.

Plaintiff's declaration consisted of four counts, - two alleging personal injuries received by him and two alleging damage to his automobile. In the first and second counts defendant is charged with general negligence in the driving of his automobile, and in the third and fourth counts with driving it in a thickly populated district of a city at an excessive rate of speed in violation of the statute. To the declaration defendant filed a plea of the general issue and a special plea.

On the trial it appeared in substance from plaintiff's testimony, corroborated in essential particulars by witnesses called by him, that he was driving his automobile south in Spaulding avenue on the west side of that street, approaching its intersection with Flournoy street, an east and west street; that as he

[illegible]

FRANK [illegible],
"Appellant,"

v.

E. [illegible],
"Appellee."

entered the intersection and started to cross it, going at a speed of about 10 miles an hour, he noticed an automobile (driven by defendant) travelling at a rapid rate of speed easterly on the south side of Flournoy street and then about 125 feet away from the intersection; that he continued on, crossing Flournoy street and observing as he crossed the nearer approach to the intersection of defendant's automobile; that when he had almost crossed the intersection he noticed that defendant's automobile, continuing on its easterly course at an excessive speed, had entered or was about to enter, the intersection and plaintiff increased the speed of his automobile and turned it slightly to the left; that after he was south of the south line of Flournoy street defendant's automobile violently struck a rear portion of plaintiff's automobile, causing it to overturn, south of the intersection and near the east curb of Spaulding avenue; and that thereby plaintiff received permanent injuries to one of his arms, and his automobile was so damaged that he was obliged to expend over $450 in repairs.

At the close of plaintiff's evidence the court denied defendant's motion for a directed verdict in his favor, and thereupon defendant, the owner and driver of said east-bound automobile, testified in his own behalf and three witnesses for him. Their testimony in essential particulars was somewhat contradictory to plaintiff's evidence as to the happening of the accident.

We think it clear that the court erred, at the close of all the evidence, in peremptorily instructing the jury to find the defendant not guilty and in entering the judgment appealed from against plaintiff. Under all the evidence the questions of defendant's negligence and plaintiff's contributory negligence were for the jury, and not the court, to decide. Plaintiff's evidence, standing alone, strongly tended to show gross negligence on defend-

entered the intersection and turned to cross it, going at a speed of about 10 miles an hour, he noticed an automobile coming by defendant) travelling at a rapid rate of speed easterly in the south side of Monroe street and upon seeing that they were going the intersection, did not continue on, crossing Monroe street and observing as he neared the center approach to the intersection of defendant's automobile that they had almost reached the intersection he noticed that defendant's automobile, continuing on its easterly course at an excessive speed, did not stop or not slow down, the intersection and plaintiff proceeded to cross of his automobile and turned it suddenly to the left, so that the rear bumper of the south side of Monroe street defendant's automobile violently struck a rear portion of plaintiff's automobile, causing it to overturn, some of the intersection and have the time and of damaging severely and have thereby plaintiff received permanent injuries to one of his arms, and his automobile was so damaged that he was obliged to expend over $[illegible] in repairs.

In the close of plaintiff's evidence the defendant's motion for a directed verdict in his favor, was overruled upon defendant, the owner and driver of his automobile testified in his own behalf and three witnesses for them. These testimony in essential particulars was sufficient contradictory to plaintiff's evidence as to the happening of the accident.

[illegible] to take it away from the jury, at the close of all the evidence, is peculiarly [illegible] for to find the credibility and in weighing the judgment arrayed from against plaintiff. Once all the evidence the questions of defendant's negligence and plaintiff's contributory negligence were for the jury, and not the court, to decide. Plaintiff's evidence, standing alone, already, tended to show grave negligence on defend-

ant's part and an absence of contributory negligence on plaintiff's part. (Libby, McNeill & Libby v. Cook, 222 Ill. 206, 213.) Defendant's counsel here contends in substance that, inasmuch as it appears that when plaintiff's automobile entered the intersection plaintiff saw defendant's automobile approaching the intersection from the right, he should immediately have stopped his automobile and allowed defendant's to pass in front of him, and, not doing so, was guilty of contributory negligence as a matter of law. We cannot agree with the contention. There being testimony by plaintiff and several of his witnesses that when plaintiff's automobile first entered the intersection defendant's automobile was 125 feet or more away, it was for the jury to decide whether plaintiff was guilty of contributory negligence in not yielding the right of way to defendant's automobile, and in continuing to advance further into and to cross the intersection. (Salmon v. Wilson, 227 Ill. App. 286, 288; Ward v. Clark, 232 N. Y. 195, 198.)

The judgment of the circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

single part and an absence of contributory negligence on plaintiff's part. (Lister, McKoll & Lister v. Lane, 247 Ill. 270, 273.) Defendant's counsel here contends in substance that, because on it appears that when plaintiff's automobile entered the intersection plaintiff saw defendant's automobile approaching the intersection from the right, he should immediately have stopped the automobile and allowed defendant's to pass in front of him, and, not doing so, was guilty of contributory negligence as a matter of law. We cannot agree with the contention. There being evidence of plaintiff and several of his witnesses that when plaintiff's automobile first entered the intersection defendant's automobile was still just as much more away, it was for the jury to decide whether plaintiff was guilty of contributory negligence in not stopping his car in defendant's automobile, and in continuing to drive his car to cross the intersection. (Lance v. Palmer, 217 Ill. App. 223, 228; Lane v. Clark, 232 N. Y. 170, 172.)

The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

Gaskins and Barnes, JJ., concur.

33125

HARRY ABRAMS,
Appellee,

v.

R. J. DWYER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 641

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced in the Municipal court of Chicago on March 15, 1928, the court struck from the files defendant's amended affidavit of merits and (defendant electing to stand by the same) defaulted him for want of an affidavit of merits and, on April 30, 1928, entered judgment against him for $474, the full amount of plaintiff's claim. This appeal followed.

In plaintiff's statement of claim, as amended, he alleged the recovery by him of a judgment against Max Saphire for $460 and costs in the municipal court on February 14, 1928, and the levying of an execution on and the taking possession by the bailiff of all of Saphire's personal property at No. 3040 Lincoln avenue, Chicago. He further alleged that he released the levy as well as the lien of the execution on said property, and that he did so in consideration of defendant signing and delivering on March 3, 1928, the following letter addressed to plaintiff's attorney:

"Re: Harry Abrams v. Max Saphire.

This is to notify you as attorney for Harry Abrams that I have accepted an assignment from Max Saphire for the benefit of creditors.

As trustee of this estate, I agree to pay your client the sum of $460, plus costs and expenses in connection with a certain judgment, which said Abrams recovered against Max Saphire. These funds to be paid out of the proceeds of the sale of the assets of Max

Saphire, which have been assigned to me as trustee and are located at 3040 Lincoln avenue.

This agreement is made in consideration of and provided you withdraw bailiff, who is now in possession of the assets at 3040 Lincoln avenue.

It is understood and agreed that I do not assume any personal liability or obligation to pay this judgment."

Plaintiff further alleged that "defendant sold said assets of said Saphire, so assigned to him, on March 12, 1928; that on March 13, 1928, defendant received as the proceeds of said sale a sum exceeding $2900, by reason whereof he became obligated to pay to plaintiff out of said proceeds said sum of $460, costs, etc.; and that demand has been made on defendant that he pay said sum," and because of his refusal so to do this suit is brought.

In defendant's amended affidavit of merits he alleges in substance that on March 1, 1928, for the benefit of creditors, Saphire assigned in writing all of his stock of merchandise, consisting of boots and shoes, and fixtures, etc., at No. 3040 Lincoln avenue, to defendant, as trustee, to sell and convert said merchandise, etc. into cash for the best price obtainable, and, after the payment of costs and expenses, to divide the proceeds among all creditors according to their respective claims; that defendant, as such trustee and not in his individual capacity, promised to pay to plaintiff said sum of $460 out of the proceeds of the sale of said assets and did deliver to plaintiff said letter of March 3, 1928; and that at the time of its delivery it was expressly agreed between the parties that plaintiff's claim, if any, should attach exclusively to the proceeds of the sale of said merchandise, etc., and that, should said assignment to defendant from Saphire be set aside for any cause, plaintiff's claim should so exclusively attach.

It will be noticed that defendant admits the signing and delivery of the letter which caused the release of the prior lien and levy upon said merchandise, etc., and that defendant does not

Supplies, which have been furnished to you as exhibits and are located at 3060 Kimball avenue.

This agreement is made in consideration of and provided you without further liability, pay the in the procedure of the amounts of $[illegible] dollars.

It is understood and agreed that I do not assume any personal liability or responsibility in your this judgment.

Plaintiff further alleges that defendant said sale

sheets of said supplies, is minimum to say, on March 27, 1972, that on March 13, 1972, defendant received on the delivery of said sale a due receipt (sic), by tender showing it account obligation to pay to plaintiff for of said property [illegible] of [illegible], [illegible], etc.; and that defendant has been made to satisfactorily [illegible] to pay due," and because of his refusal so to do this suit is [illegible].

In defendant's general [illegible] of denial or [illegible] in accordance that on March 1, 1972, in the county of [illegible], Duplite maintained in [illegible] all of his [illegible] of [illegible], [illegible] of [illegible] and [illegible], [illegible], etc., at the [illegible] avenue, to defendant, as [illegible], it will [illegible] and [illegible], etc. Into each for the best [illegible] [illegible], [illegible] the [illegible] of [illegible] and [illegible], to [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] and not in his [illegible] [illegible], [illegible] [illegible] [illegible] said [illegible] of [illegible] [illegible] of the [illegible] of [illegible] [illegible] and did deliver to plaintiff said letter of March 7, [illegible] [illegible] [illegible] the time of the delivery it was [illegible] [illegible] [illegible] the [illegible] that plaintiff's claim, if any, should [illegible] [illegible] [illegible] [illegible] of the sale of said [illegible], etc., [illegible] [illegible] would but [illegible] to [illegible] from Duplite to not [illegible] the [illegible] [illegible], plaintiff's claim should be [illegible] [illegible].

It will be noticed that [illegible] [illegible] the [illegible] and [illegible] of the letter which [illegible] the [illegible] of [illegible] [illegible] and [illegible] upon said [illegible], etc., and [illegible] [illegible] not

deny the allegations contained in plaintiff's statement of claim to the effect that defendant, as trustee, sold said merchandise, etc., on March 12, 1928, and on the following day received therefor a sum exceeding $2900; nor does he deny the further allegation as to plaintiff's possession of said sum or fund on March 15, 1928, when the present suit was commenced. These allegations must be considered as admitted facts. (Stoddard v. Illinois Improvement Co., 275 Ill. 199, 204; Hamill v. Watts, 180 Ill. App. 279, 282.)

Citing the case of Schumann-Heink v. Folsom, 328 Ill. 321, 329, and two other Illinois decisions therein mentioned, counsel for defendant here contend that the court erred in striking defendant's amended affidavit from the files and entering the judgment appealed from, for the reason that it appears from defendant's said letter of March 3, 1928, (acted upon by plaintiff) that defendant did not agree to assume any individual liability or obligation to pay said judgment of $460, costs, etc., in case plaintiff released the levy of the execution made upon said judgment. We cannot agree with the contention. The action was properly brought against defendant in his individual name, although plaintiff sought a recovery out of a fund in defendant's possession as a trustee. In Equitable Trust Co. v. Taylor, 330 Ill. 42, 46, it is said: "An action against a trustee in his representative capacity is unknown to a court of law, for the law takes no cognizance of the trust relation. (Wahl v. Schmidt, 307 Ill. 331.) If a trustee makes a contract in his own name for the benefit of the trust estate he is liable on it personally and not in his representative capacity, whether he describes himself as trustee or not." Because of defendant's letter of March 3, 1928, plaintiff released the lien of the execution on his judgment against Saphire, and defendant came into possession of Saphire's assets, which he thereafter sold for

deny the allegations contained in plaintiff's affidavit of claim to the effect that defendant at Toronto, sold and warranted, etc., on March 16, 1928, and on the following day, delivery was made for a sum exceeding $200; nor does he deny the further allegation as to plaintiff's possession of said car or that on March 16, 1928, upon the premises said was conveyed. These allegations must be considered as admitted facts. (Goodman v. Illinois Insurance Co., 273 Ill. 197, 201; Smith v. Smith, 197 Ill. App. 271, 272.)

Citing the case of Johnson-Brown v. Johnson, 201 Ill. 321, 329, and two other Illinois decisions dealing with replevin, counsel for defendant here contend that the court erred in entering judgment in accordance with the affidavit from the files and refusing the judgment appealed from, for the reason that it appears from defendant's said letter of March 2, 1928, issued upon a plaintiff's bond, defendant did not agree to assume any individual liability or obligation to pay said judgment of $[illegible], nor, in fact, in any instance relieved the levy of the execution made upon said judgment. It cannot agree with the contention. The motion for judgment therein denied defendant in his individual name, although plaintiff should be recovery out of a fund in defendant's possession or a bailee. In Equitable Trust Co. v. Tucker, 324 Ill. 1, 3, it is said: "An action against a trustee in his representative capacity is unknown to a court of law, for the law takes no cognizance of the trust relation." (Ward v. Wright, 7 Ill. App. 1.) If a trustee makes a contract in his own name for the benefit of the trust estate he is liable on it personally and not in his representative capacity, whether he describes himself as trustee or not." Because of defendant's letter of March 2, 1928, plaintiff relinquished the lien of the execution on his judgment against Tuckter, and defendant came into possession of Tuckter's assets, which he thereafter held for

a sum in excess of $2900. This sum or fund was admittedly in his hands when the present action was commenced, and plaintiff, by his action, sought to compel defendant to pay out of said fund the amount of the judgment against Saphire and which amount defendant, for the consideration shown, had agreed to pay to plaintiff. We think that the court properly struck defendant's amended affidavit of merits from the files and properly entered the judgment appealed from against defendant.

Accordingly the judgment is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

a case in Kansas of 1909. This was to land was worthless in the hands when the process making the assessment, was "illegal", by the action, though in order determine to pay out of with that the amount of the judgment against Hanley was taken among creditors, for the condemnation above, but proved to be pointless. We think that the court properly denied intervenor's motion without of merits for the first and properly entered the judgment expelling the appellant defendants.

In reversing the judgment in entirety.

Judge.

Dissent and Brown, J., dissent.

33134

152 (A)

C. V. RAISER,
Appellee,

v.

TELLER CORPORATION,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 27, 1927, complainant filed a bill in the Superior court against the Teller Corporation and other defendants for an injunction and an accounting. Answers were filed, the cause was referred to a master and subsequently the bill was dismissed for want of equity as to said other defendants. On April 28, 1928, the court, approving the master's report save in one particular, entered a decree against the Teller Corporation, finding that it was indebted to complainant in the sum of $3,265.08, and adjudging that it pay said sum to him "as and for his share of profits on moneys received for the rental of space in the Furniture Mart Building, under the contract between said parties introduced in evidence," that all exceptions to the master's report be overruled and that the Teller Corporation pay the costs, including master's fees. The present appeal is from this decree.

Complainant's bill is based upon an agreement, dated December 10, 1924, and signed by the Teller Corporation (by Jacob Teller, its president) as first party, and complainant as second party. After setting forth that the Teller Corp. is now engaged in leasing and sub-leasing exhibition spaces and has contracted with the American Furniture Mart Building Corporation of Chicago

for an option to lease the spaces or parts thereof, known as spaces 5 to 18, on the second floor of said Furniture Mart Building, and that complainant "is ready and willing to undertake the sub-leasing of said spaces," the Teller Corp. gives to complainant "the sole and exclusive right for the term beginning December 10, 1924, and ending May 1, 1925, to procure tenants and sell leases for said spaces, 5 to 18, provided that all tenants and leases shall be acceptable to first party (Teller Corp.) and the American Furniture Mart Building Corp.;" and complainant agrees that the Teller Corp. "is not obligated * * to lease from the American Furniture Mart Corp. any space or spaces included in spaces 5 to 18, except such space or spaces or part thereof as are actually sold, and the leases and tenants for said space or spaces are acceptable." In clause 7 of the agreement it is provided that "in full compensation for the services" of complainant, the Teller Corp. agrees to pay, and complainant agrees to accept, "fifty per cent (50%) of the net profits on and arising out of any and all leases signed under this agreement by the Teller Corp. with any and all tenants for the said spaces 5 to 18." In clause 8 it is provided that "net profits shall be the difference between gross receipts and expenditures as hereinafter defined." In clauses 9 and 10 are stated what are to be considered gross receipts, and what expenditures. In subsequent clauses provision is made for the preparation by the Teller Corp., and submission to complainant, of "statements of net profits on or before the fifth day after the tenant or tenants of the first party pay their rent," and that upon acceptance of the statements the Teller Corp. shall pay to complainant the 50 per cent of said net profits.

In complainant's bill, after setting forth the agreement,

for an option to lease the space or part thereof, known as spaces 5 to 18, on the second floor of said Building and Premises, and that compliment "is proof and relates to negotiations for re-leasing of said spaces," the Tailor Corp. has to compliment the said and exclusive right for the term hereinafter 15, 1962, commencing May 1, 1962, to procure the rent of said leases for said spaces, 5 to 18, provided that (a) tenant and lessee shall be acceptable to first party (Tailor Corp.) and the mortgage financing Mart Building Corp.;" and compliment states that the Tailor Corp. "is not obligated - " to lease from the landlord Marbrown Mart Corp. any space or spaces located in spaces 5 to 18, except such space or spaces or part thereof or are mutually and the lessee and tenants for said space or spaces are acceptable." In clause 7 of the agreement it is provided that "in full compensation for the services of negotiation, the Tailor Corp. agrees to pay, and compliment agrees to accept, "fifty per cent (50%) of the net rental on and relating out of any and all leases which shall be made by the Tailor Corp. with (a) and all tenants for the said spaces 5 to 18." In clause 8 it is provided that "net rental shall be the difference between gross rental and commissions or brokerage after deduct." In clause 9 and 10 the states that are to be considered gross rental, and what expenses. In subsequent clauses provision is made for the payment by the "Tailor Corp." and subsidiaries to compliment, of "commissions at the rate of 5% or before the first day after the tenant or tenants of the first party pay their rent," and that upon termination of the attorneys the Tailor Corp. shall pay to compliment, the 5% per cent of said net profits.

In compliment's bill, after deducting all the expenses,

he alleged that he entered upon his duties thereunder "with such success that the rental of said space was practically completed by January 26, 1925;" that on that date the agreement was modified by a letter written by him, marked "Accepted" by Jacob Teller for the Teller Corp., to the effect that complainant would make no further efforts towards securing sub-tenants for said spaces after that date; that under the agreement he devoted his time and attention to the selling of leases for the spaces; that by January 26, 1925, there were secured 38 tenants, - the leases running for varying terms and some providing for renewals or extensions, optional with the tenant; that the payment of rent was due semi-annually, - on the first days of June and December; that defendant rented all of the spaces from said American Furniture Mart Corp. at a rate of $1.50 per square foot per annum, and that complainant secured leases of certain portions at the rate of $2 per square foot per annum; that the difference between these amounts, after deducting the necessary expenditures, "was the profit which, under the agreement, was to be divided equally between complainant and defendant;" that on January 26, 1925, complainant received from defendant a statement of income as to the leases and a check for $2,471.12 as his distributive share of the profits, and that he accepted the check; that on or about July 1, 1925, complainant received another statement (incorrect as to receipts and expenditures) together with a check for $193.68, which statement and check he returned; that thereafter defendant tendered for the same six months period other statements which complainant refused to accept; that no other checks have been tendered; that in said statements, and others for subsequent periods, defendant has fraudulently attempted to charge various improper expenses, including a salary for Jacob Teller, and to shift, change and vary some of the leases; that on June 1, 1927, additional amounts

will become due under options contained in the leases, and defendant will endeavor to either cancel said leases and place new tenants in possession or transfer the lessees to different quarters, and to maintain that such leases are not those which were originally made by complainant, and will thereby deprive him of amounts due under the agreement; and that because of these facts an injunction should be issued against defendant, a receiver appointed, and an accounting had.

In defendant's answer it denied that it had been guilty of any wrongdoing, or that complainant had performed his part of the agreement or was entitled to any of the relief as prayed. Shortly before the decree was entered defendant, by leave of court, amended its answer by adding an allegation that, at the times of the making of the agreement and of the performance of his services thereunder, complainant "was acting in the capacity of a broker and had not procured, and did not hold, from the Department of Registration and Education of the State of Illinois, a certificate of registration, as required by Chapter 17a of the revised statutes of Illinois."

On the hearing before the master it was admitted that neither at the time of the signing of the agreement nor at the times of the performance of complainant's services thereunder, did he have any such certificate of registration.

Counsel for defendant contended in substance before the chancellor, and contend here, that complainant is not entitled to recover under his bill because, at the time the agreement was signed and at the times he performed his services thereunder, he was acting as a real estate broker within the meaning of the statute, and did not hold a certificate of registration or a license as such as provided by the statute. Counsel further contend that in any event the amount

of the decree is much too large, as appears from a preponderance of the evidence. Counsel for complainant, on the other hand, contend that there is nothing in said statute, as it existed when said agreement was signed and when complainant's services were performed, that prevents a recovery by him in the present proceeding, and for the reason that in performing such services he was not a real estate broker within the meaning of the statute and was not required to have such a certificate or license; and they further contend, in accordance with certain cross-errors assigned, that the court erred in overruling certain of complainant's exceptions to the master's report and that the amount of the decree against defendant should have been $13,615.62.

In 1921 the Legislature passed an Act entitled "An Act in relation to the definition, registration and regulation of real estate brokers and real estate salesman." (Cahill's Stat. 1923, chap. 17a, p. 227.) In section 1 of the Act it is in part provided:

> "That on and after January 1, 1922, it shall be unlawful for any person to act as a real estate broker or real estate salesman, * * without a certificate of registration issued by the Department of Registration and Education. Provided, that nothing in this Act contained shall prohibit the co-operation of, or a division of, commissions between a duly registered broker of this State and a non-resident broker having no office in this State. * * *

In section 2 of the Act it is in part provided:

> "A real estate broker within the meaning of this Act is any person, association, copartnership or corporation, who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases, or offers to lease, or rents or offers for rent, any real estate, or negotiates leases thereof or of the improvements thereon for others. * * *

Said section 2 was amended on July 11, 1925 (Cahill's Stat. 1927, Chap. 17a, page 171) by the addition of the clause that "the term 'real estate,' as used in this act, shall include leaseholds and other interests less than a freehold." In section 3 of

of the decree in such one large, is apparent from a [illegible] of the evidence. Counsel for respondent, on the other hand, contends that there is evidence in this record, as it relates to said agreement and which supplements's testimony that performed, that provides a tenancy by man in the [illegible] ing, and for the reason that is preceding that evidence is not a real estate broker while in meeting of the parties and was not required to have such a [illegible] or licensed and that under contend, in accordance with certain [illegible], that the court erred in overruling motions of respondent's exceptions to the master's report and that the award of the master against defendant should have been disregarded.

In 1953 the Legislature passed an act entitled "An Act in relation to the definition, regulation and licensing of real estate brokers and real estate salesmen." (Smith's Ill. Ann. Stat., 1953, p. [illegible]) In section 1 of [illegible] it is by said provided:

"That on and after January [illegible], 1953, it shall be unlawful for any person to act as a real estate broker or to offer or attempt to negotiate, by or on behalf of another, or to offer or attempt to negotiate, by the [illegible] of negotiation and bargaining, [illegible], that meaning in this act concerning real estate, [illegible] or a division of, commissions between [illegible] broker of this state and a non-resident broker having no office in this state. * * *"

In section 2 of the act it is in part provided:

"A real estate broker within the meaning of this act is any person, [illegible], who for a [illegible] or valuable consideration sells or offers for sale, buys or offers to buy, [illegible] or rents or offers or asks or undertakes to find vacancies, or who lists, or offers to list, or solicits or asks for lists, any real estate, or [illegible] for other. * * *"

This section 2 was amended on July 11, 1953 (Smith's Ill. Ann. Stat., 1953, p. [illegible]) by the addition of the clause that "the term 'real estate,' as used in this act, shall include time-sharing and other interests like a freehold." In section 3 of

the act it is stated how the certificate, mentioned in section 1, may be obtained. In other sections it is stated what fees are to be paid upon the issuance of a certificate, how it may be renewed and how revoked, etc. In section 16 are prescribed heavy penalties for any violation of the act, and in section 17 it is stated that its requirements shall be in addition to those contained in any ordinance of a city or village, licensing and regulating real estate brokers.

It is to be noted that by the provisions of the act, as originally passed in 1921 and which was in force when the agreement between the parties was executed (December 1[illegible], 1924) and when complainant's services thereunder were rendered, it is made "unlawful for any person to act as a real estate broker * * without a certificate of registration," that severe penalties are prescribed for any violation of the act, and that in the definition of a "real estate broker" is included any person who, for a compensation or valuable consideration, "negotiates leases" of real estate "or of the improvements thereon for others."

We think it clear, from the agreement introduced in evidence, the allegations of complainant's bill and from his own testimony, that he, in procuring for defendant the sub-leases mentioned, was acting as a real estate broker within the meaning of the statute. By the agreement he was to "procure tenants and sell leases" for certain space in the Furniture Mart Building, which was an improvement upon real estate, and he was to do this for defendant for a certain agreed "compensation or valuable consideration," viz, "fifty per cent (50%) of the net profits," as defined in the agreement. Complainant testified before the master that he was a resident of Chicago, and that after the agreement was executed

[illegible]

"I proceeded to rent space, in accordance with the agreement with the Teller Corporation; I secured an elaborate list of prospects for the space and I got in touch with them; many of them sent representatives to Chicago with some of whom I signed leases; other such representatives reported to their principals and often space was rented through further correspondence; at this time I entered into 41 leases under this agreement; copies were made when the originals were signed; and they were entered into in each case between the Teller Corporation and the party whom I had secured as lessee."

It is well settled law in this State that "where the subject matter of an agreement is prohibited and made unlawful by statute or by a municipal ordinance, it cannot be enforced, though the statute or ordinance merely inflicts upon the offender a penalty, and does not in terms declare the contract void." (Cummings v. Foerster, 234 Ill. App. 630, an unpublished opinion of this appellate court, filed May 27, 1924; O'Neill v. Sinclair, 153 Ill. 525, 530; Douthart v. Congdon, 197 Ill. 349, 353.) Furthermore, it appears from complainant's testimony that his procurement of the sub-leases during the period from December 10, 1924, until January 26, 1925, (when said agreement was modified as shown) was not the only work he was doing as a broker; that after July, 1924, he secured other leases in another building for Jacob Teller; and that he is still engaged generally in brokerage and promotional work.

In view of the facts disclosed, the provisions of the statute and the above decisions, our conclusions are that complainant cannot recover any moneys from defendant in the present proceeding and that the chancellor should have dismissed complainant's bill for want of equity. His counsel here argue, in substance, because of the amendment of 1925 to section 2 of the statute, wherein it is stated that the term "real estate" as used in the statute "shall include

"I proceeded to read carefully, in accordance with the agreement with the Tailor Corporation, I noticed an absurdity in list of prospects for the space now I was in touch with that many of them most representative in Chicago city. Some of them I might insert, other such representative concerns in small printing and often space was lacking therefor. Further correspondence; at this time I received from a letter this agreement; copies were sent, when the original were signed, and they were returned late in such case returned to Tailor Corporation and the point also (and contrary to law."

It is well settled law in this state and Illinois that the subject matter of an agreement if prohibited and made illegal by statute or by a municipal ordinance, it cannot be enforced, though the statute or ordinance merely declares upon the offender a penalty, and does not in terms render the contract void." (Lumbrera v. Hartman, 114 Ill. App. 1, 10, on rehearing opinion of this appellate court, filed May 27, 1904, Affirmed v. Kimball, 185 Ill. 283, 288; Kimball v. Chicago, 197 Ill. 349, 355.) Therefore, it appears from Complainant's testimony that the performance of the contract during the period from December 31, 1941, until January 22, 1942, (when said agreement was modified as above) was not the "act" which he was doing as a broker; but after July, 1941, in accordance other issues in another pending for Jack Tailor and Jack Ze is still engaged actively in promoting the business.

In view of the facts disclosed, the provisions of the statutes and the above decisions, our conclusions are that complainant cannot recover and merely does defendant in the present proceeding and that the chancellor should have dismissed Complainant's bill for want of equity. The contract here sued, in our opinion, violates of the amendment of 1925 to section 2 of the statutes, whereas it is noted that the term "real estate" as used in the contract "shall include

leaseholds and other interests less than a freehold," that complainant, in procuring for defendant the sub-leases at times prior to the passage of the amendment, cannot be considered as such a "real estate" broker at those times as required him to have a certificate or license. We do not think the argument has any force. The definition of a real estate broker, as contained in the section before and after the amendment, included "any person * * who leases, or offers to lease, * * any real estate, or negotiates leases thereof, or of the improvements thereon, for others." The evidence disclosed that the large Furniture Mart Building was an improvement on land in Chicago, and that the sub-leases negotiated by complainant were for spaces in that building, of which leases defendant was the lessor.

These holdings render unnecessary any discussion of the further contention of counsel for defendant, viz, that the amount of the decree appealed from is excessive, or any discussion of the cross errors assigned by complainant. We may say, however, that our examination of the evidence convinces us that the amount of the decree is excessive, and that there is no substantial merit in the cross-errors.

For the reasons indicated the decree of the Superior court is reversed and the cause is remanded to that court with directions to dismiss complainant's bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Barnes, JJ., concur.

33143

EDWIN THURSTON and
AMANDA THURSTON,
Appellees,

v.

MERRILL L. HAWKINS,
MICHAEL P. POSDAL and
H. P. BURNINGHAM, as Trustees
of HOME BUILDERS' INVESTMENT
TRUST and GUARDIAN FINANCE
CORPORATION,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

252 I.A. 642

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced in the Superior court on July 13, 1927, there was a trial before a jury in July, 1928, resulting in a verdict in favor of plaintiffs for $1,000. Judgment for that amount was entered against defendants and they appealed.

Plaintiffs' declaration consisted of the common counts, to which defendants filed an amended plea of the general issue. The affidavit accompanying the plea is by Perry B. Brelin, one of their attorneys, who stated that the defense was that no sum of money was due from defendants to plaintiffs, and that "there were certain business transactions between plaintiffs and one Frank O'Neill, whereby they purchased certain beneficial interests of the Home Builders' Investment Trust for a valuable consideration from an individual owner thereof."

Upon the trial Edwin Thurston, one of the plaintiffs, was their principal witness. They also called as their witness Perry B. Brelin, defendants' attorney, and introduced a number of instruments and other writings. Four witnesses testified for

defendants, viz., Francis A. Hegar, cashier and bookkeeper of the Guardian Finance Corporation and of the Home Builders Investment Trust; Michael P. Posdal, secretary of the former, and a trustee of the latter; James R. M. Morrison, an architect, retained as such by the trustees of the Investment Trust and in charge of the architectural department of the "Home Builders of America" (still another organization), and also a vice-president and a director of the Finance Corporation; and said Frank O'Neill, a "salesman" employed by the Finance Corporation during the years 1924, 1925 and 1926, whose duties were to "solicit savings accounts from people who wanted to build homes," and to negotiate building contracts with such people. The testimony disclosed that during those years the Finance Corporation was an Illinois corporation with principal office in Chicago; that the Investment Trust was not incorporated but was a "pure trust;" that the "Home Builders of America" (another trust) contracted to build and built houses for various people; that the Investment Trust advanced money to the "Home Builders of America" for that purpose, receiving in return mortgage bonds executed by the respective owners of the real estate upon which the houses were to be built; that the Finance Corporation negotiated the sale of bonds and other securities for the Investment Trust; and that the three organizations had adjoining offices in a downtown building in Chicago and that their respective businesses practically amounted to one business. It appeared that defendants were accustomed to solicit people, desiring to build homes on their own real estate, to make monthly deposits with defendants, on which interest was paid, for the purpose of accumulating a fund of sufficient size to warrant the commencement of building, and that defendants also were accustomed to solicit the deposit with them of moneys in larger amounts, or

salesmanship, viz., Francis L. Lager, president and manager of the Guardian Finance Corporation and of the Home Building and Investment Trust; Alden J. Weehl, secretary of the former, and a director of the latter; James H. Ca. Martson, an architect, retained in part by the trustees of the Investment Trust and in charge of the architectural department of the "Home Building and Loan" (still another organization), and also a vice-president and a director of the Finance Corporation; and Alan Ryan Ill, a "salesman" employed by the Finance Corporation during the years 1921, 1922 and 1923, whose duties were to "solicit savings accounts from people who wanted to build homes," and to negotiate building contracts with such people. The testimony disclosed that during these years the Finance Corporation was in alleged partnership with, maintained offices in common; that the Investment Trust was not incorporated but was a "pure trust"; that the "Home Building and Loan" (another trust) contracted to build one hundred homes for various people; that the Investment Trust advanced money to the "Home Building and Loan" for that purpose, receiving in return mortgages thereon executed by the respective owners of the real estate upon which the houses were to be built; that the Finance Corporation solicited the sale of bonds and other securities for the Investment Trust; and that the three organizations had adjoining offices in a downtown building, in Chicago and that their respective business was practically conducted as one business. It appeared that "salesmen" were employed to solicit people, desiring to build homes on their own real estate, to make monthly deposits with the Corporation, on which interest was paid, for the purpose of accumulating a fund of substantial size to warrant the commencement of building, and that "salesmen" also were commissioned to solicit the deposits with them of money in larger amounts, or

securities to be converted into cash, for similar purposes. It further appeared that early in 1925, plaintiffs were the owners of a piece of land in Cook County upon which they desired to build a home; that Edwin Thurston's occupation was that of a switchman for a railroad company in Chicago; and that in March, 1925, Thurston first met O'Neill and thereafter, as the result of the latter's solicitations, had business dealings with defendants.

According to Thurston's testimony, O'Neill at the first conversation stated that, if plaintiffs intended to build a home on their lot, it would pay them to "join the Home Builders' of America and save their money through the Home Builders' Investment Trust." Shortly thereafter, on March 17th, plaintiffs gave O'Neill $200 in cash, signed a so-called "Original application, No. B-3315," addressed to the Finance Corporation, and in a few days received an ordinary deposit book in which the $200 was credited to them. The application is quite a formidable instrument, printed on a form and filled out in pencil writing. On the back of it, in very fine print, are many so-called "conditions and privileges," all stated to be binding upon the applicant. It states on its face that application is made "through the Finance Corporation" to the Trustees of the Home Builders of America "for the erection <u>at my option</u> of a Bungalow building to cost approximately $6500, under the benefits and privileges" of a certain named plan, "which provides that after I have complied with all requirements for the purchase of bonds, as set forth in the table hereto attached (being on the back), the cost of such building shall be financed and the building erected <u>to my order</u> on the <u>basis of cost plus</u> five per cent (5%);" that application also is made "for the purchase of $1000 of the par value of bonds," belonging to the Trustees of said Investment Trust, "which bonds are to be six per cent (6%) gold bonds secured by junior mortgage upon specific

[illegible] is to be converted into cash, for similar purposes. It further appears that a city in Iowa, [illegible] were the owners of a piece of land in Cook County upon which they desire to build a home; that Edwin Lowrie's occupation was that of a publicist for a railroad company in Chicago and that in March, 1893, Lowrie filed his "Bill and Statement", as the result of the bankrupt's solicitations, had matters explained with detectives.

According to Lowrie's statement, "Bill" at the first conversation stated that, if plaintiffs attorney to build a home on their lot, it would pay them to "join the [illegible] of [illegible] and save their money through the Home Building Investment Trust." Shortly thereafter, on March 17th, plaintiffs gave "Bill" [illegible] in cash, signed a so-called "[illegible] agreement", [illegible] "Bill" addressed to the Finance Corporation, and in a few days received an ordinary deposit book in which the [illegible] credited to them. The application is quite a formidable instrument, printed on a [illegible] and filled out in pencil writing. On the back of it, in very fine print, are many so-called "conditions and privileges," all tending to be binding upon the applicant. It appears on its face that applicant then is made "through the Finance Corporation" to the Trustees of the Home Building of Chicago "for the purpose of [illegible] of a Chicago building to cost approximately [illegible], under the benefit and privilege" of a certain named plan, "which plan has been duly [illegible] complied with all requirements for the purchase of [illegible], as set forth in the table hereto attached (being on the back), one unit of such building (Unit 4) [illegible] and the building created [illegible] on the basis of cost plus "the per cent [illegible]" that [illegible] is made "for the purchase of [illegible] or the per value of [illegible]," belonging to the Trustees of said Investment Trust, "which [illegible] are to be [illegible] per cent (4%) [illegible] secured by [illegible] mortgage upon [illegible]

real estate in Illinois;" that "I hereby agree to purchase ten dollars ($10) of said bonds on the 12th day of each month hereafter, and I also herewith tender you $200 in cash, - it being agreed that, from said amount of my additional payments, twenty per cent (20%) of the total amount of bonds so applied for shall be used as security for the punctual performance of all the covenants of this application, and credited to the final purchase of bonds applied for hereunder;" and that "it is agreed that I may use bonds above applied for as a part of the purchase price of the property hereinbefore referred to." Thurston further testified that plaintiffs, after the signing of the application, continued for a considerable period to deposit with the Finance Corporation $10 every month, which deposits were credited in the book mentioned, and that finally the sum to their credit in the particular account amounted to $387.

Thurston further testified that O'Neill, after March, 1925, continued to call upon plaintiffs and urge them to invest more money with defendants towards the building of their home; that in June, 1925, learning that plaintiffs owned a $1,000 Apartment Building Bond which paid seven (7%) per cent annual interest, O'Neill suggested that they deliver the bond to defendants who would pay par for it and credit them with $1,000 and thereafter pay to them interest thereon at the rate of eight per cent per annum; that O'Neill stated that if his suggestion was followed, when plaintiffs got ready to commence building their home, defendants would "turn over" to plaintiffs the $1,000 and the accrued interest; and that plaintiffs, relying upon O'Neill's statement, delivered the apartment bond to defendants. O'Neill, defendants' witness, was asked if during his conversations with plaintiffs in June, 1925, "anything was said by you or Mr. Thurston about his being able to get the money back" and he replied: "I can't just recall that; I don't think there was." He further testified: "I

real estate in Illinois"; that "I hereby agree to purchase ten dollars ($10) of said bonds on the 15th day of each month thereafter, and I also herewith tender you $100 in cash, - it being agreed that from said amount of my additional payments, twenty per cent (20%) of the total amount of bonds so applied for shall be paid to Security for the punctual performance of all the covenants of this application, and credited to the final purchase of bonds applied for hereunder'; and that "it is agreed that I may use funds above applied for as a part of the purchase price of the property hereinbefore referred to." Thurston further testified that plaintiffs, after the signing of the application, continued for a considerable period to deposit with the Finance Corporation $10 every month, which deposits were credited in the bond pass-book, and that finally the sum to their credit on the particular account amounted to $187.

Thurston further testified that O'Neill, after March, 1925, continued to call upon plaintiffs and urge them to invest more money with defendants towards the building of their house; that in June, 1925, learning that plaintiffs owned a $1,000 Liberty bond [illegible] and which paid seven (7%) per cent annual interest, O'Neill suggested that they deliver the bond to defendants who would pay and [illegible] it and credit them with $1,000 and thereafter pay on this amount interest at the rate of eight per cent per annum; that O'Neill stated that if his suggestion was followed, when plaintiffs got ready to commence building their home, defendants would "come over" to plaintiffs the $1,000 and the earned interest; and that thereafter, relying upon O'Neill's statements, [illegible] delivered the [illegible] bond to defendants. Thurston, defendants' witness, was asked if during his conversation with plaintiffs in June, 1925, "anything was said by him to the [illegible] about his being able to get the money back" and he replied: "I don't just recall that; I don't think there was." He further testified: "I

told him the Home Builders would finance his building and build it for him and there would be no charges for second mortgage money. * * I told him that from time to time people wanted to transfer their 'beneficial interests' and * * that the Home Builders could procure them through somebody who wanted to transfer them; * * I told him we never have any for sale, but that sometimes 'beneficial interests' were transferred from somebody else that wanted to transfer'

Plaintiffs' evidence further shows that Thurston on June 22, 1925, met O'Neill in the offices of defendants, and Thurston delivered said apartment bond of $1,000 at the window of Hegar, cashier of the Guardian Finance Corporation, and received that company's printed cashier's receipt, dated "6/22/25," signed by Hegar, as follows: "Received of Edwin Thurston one thousand dollars, for account of _____; to apply on Ben. Ints." (Beneficial Interests). On the same day O'Neill caused Thurston, on behalf of himself and wife, to sign an instrument, partly printed and partly in pencil writing and addressed to O'Neill at defendants' office, whereby the undersigned "designates and constitutes you (O'Neill) as my agent and representative to procure for me 'Forty Beneficial Interests from the Home Builders Investment Trust,' for which I have paid in cash herewith the sum of $1,000 to the Guardian Finance Corporation. * * It is agreed and understood that you are acting solely as my agent in this matter and are responsible only to the extent of procuring proper transfer of said Beneficial Interests to me at the price and on the terms above mentioned and I agree to accept said Ben. Ints. subject to the conditions thereof." Two days afterwards Thurston received from the defendant, Burningham, another rather remarkable instrument. A casual glance suggests that it might be a valuable security, but examination discloses it is stated therein to be merely a receipt. It is dated June 24, 1925, is signed "Trustees of Home

told him the Dame Publicity would issues his building and would
in for (in and [illegible]) by an charges for [illegible] [illegible]
e.g. I told him that from time to time people [illegible] to [illegible]
their 'personal interests' and e.g. that the Dame Publicity would
process [illegible] through [illegible] to [illegible] that e.g. I
told him [illegible], but that [illegible] 'personal
interests' were [illegible] from [illegible] also that [illegible] to [illegible]
'Plausibility' evidence [illegible] [illegible] on June
20, 1952, met [illegible] in the offices of [illegible], and [illegible]
delivered [illegible] payment [illegible] of $1,000 [illegible] under [illegible]
[illegible] of the Guardian Publishing Corporation, and [illegible] that company's
printed [illegible] letter, dated [illegible] signed by [illegible], as
follows: "Received of [illegible] the [illegible] [illegible], the
amount of _____ to apply on [illegible] Personal
Interests). On the same day [illegible] [illegible], on behalf of
himself and wife, to sign an [illegible] [illegible] and [illegible] in
[illegible] and interested in "Bolli [illegible] [illegible] the
undersigned "[illegible] and [illegible] [illegible] ([illegible]) [illegible]
and representative to present for [illegible] 'Forty Annual Interest' from
the Dame Publicity Investment Trust', for which I have paid in cash
herewith the sum of $1,000 in the Guardian Income Corporation. * *
It is agreed and understood that you are acting solely as my agent
in this matter and are responsible only in the event of [illegible]
proper [illegible] of [illegible] interests to me at the price and
on the terms above mentioned. [illegible] to [illegible] and [illegible]
subject to the conditions [illegible]." The [illegible] [illegible]
received from the defendant, [illegible] [illegible] [illegible]
instrument. A second [illegible] [illegible] [illegible] [illegible] on a [illegible]
security, but [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
a receipt. In [illegible] [illegible], [illegible] [illegible] [illegible]

pencil

Builders Investment Trust," by Hawkins and Posdal as officers thereof, and bears the Trustees' seal. It has a colored border. It is partly printed in script and partly in typewriting. At the top is "Number 711" and "40 Beneficial Interests." And the trustees "hereby declare that Edwin and Amanda Thurston are the owners of forty of the equal Beneficial Interests, of no expressed par value each, fully paid and non-assessable, under and subject to a Declarati of Trust, dated June 30th, 1921, creating HOME BUILDERS' INVESTMENT TRUST, and filed with the Depositary designated thereunder, transferable in accordance therewith. This instrument is intended to be, and shall be construed only as a receipt for money or property paid to or delivered to the Trustees under and for the purposes set forth in said Declaration of Trust to aid Courts of Equity having jurisdiction over matters incident to the administration of this trust, and also the Trustees, in identifying persons interested therein, and to prote the trust estate and safeguard the rights of Beneficiaries, and is issued and held under and subject to the provisions of said Declaratio of Trust." Where said declaration is filed, what is the purpose thereof, or what is a "Beneficial Interest," or its value as a security or otherwise, is not mentioned. The instrument shows upon its face, however, that the Investment Trust have such "interests" to sell.

Thurston further testified that shortly after June, 1925, he informed defendants that he desired to make arrangements to build the proposed home on plaintiffs' property in Clarendon Hills; that he was introduced to defendant, Hawkins; that he explained to him the character and general plan of a house to cost $6,500, approximately; that Hawkins said that defendants would commence immediately to draft plans and that such a house could be built for that price "with 5 per cent Home Builders' profit, which would include free

Buildings Investment Trust," by Dunning and Jordan, on behalf of
thereof, and hence the Trustees' well. In the [illegible]
It is partly printed in [illegible] and partly in [illegible]. The
top is "Money [illegible]" and "Co Secretary [illegible]." And the Trustees
"hereby declare that their [illegible] for the [illegible] of
[illegible] of the equal [illegible] "shares", of [illegible]
each, fully paid [illegible] and subject to [illegible]
of Trust, dated June 26th, 1889, [illegible]
[illegible], and filed with the Deposit [illegible]
able in [illegible]. This [illegible] is intended to be, and
shall be construed only as a [illegible] to [illegible] paid to or
delivered to the Trustees [illegible] for the purposes and [illegible]
said Declaration of Trust [illegible] of [illegible]
over [illegible] in the [illegible] of [illegible], but also
the Trustees, in [illegible] [illegible], and to [illegible]
the trust [illegible] and [illegible] [illegible], and to
issued and [illegible] and subject to the provisions of said [illegible]
of Trust." There said declaration is false; that is the [illegible]
thereof, or that is a "[illegible]" or its value as a
security or otherwise, is not mentioned. The [illegible] shows upon
its face, however, that the Investment Trust have [illegible] "interest"
to sell.

Therefore further [illegible] that [illegible] after June, 1889,
an informal [illegible] that he [illegible] to [illegible] [illegible] as [illegible]
the proposed home on [illegible] property in [illegible] Hilles; that
he was introduced to [illegible], [illegible] that he explained to him
the character and general plan of a house to cost $[illegible], [illegible]-
mentally that [illegible] said that [illegible] would [illegible] [illegible]
to start plans and that such a house could be built for [illegible] price
"with a per [illegible] Home Building profit, which would include [illegible]

architect's services;" that Thurston then was introduced to Morrison, the retained architect of defendants, and others, and he had many interviews with them, and a first set of plans was drafted and submitted to him; that these were not satisfactory and others were drafted and submitted and changes made; that on December 19, 1925, he received a letter, signed by the "Home Builders of America," giving an itemized estimate of the cost of the proposed house, which totalled $8,944 "not including a garage, or the Home Builders' fee of 5%, or other incidental expenses;" that he complained to Posdal, saying he could not afford to pay such an amount and Posdal suggested making other changes which would reduce the cost; that other interviews were had with Posdal and Morrison, but that no plans for a house costing approximately $6,500, plus said 5% fee, were submitted, and that finally in the spring of 1926, at an interview had with Posdal and Morrison, Thurston said that he "was done" and "wanted to wind up" matters; that he was informed that he owed Morrison $350 for drafting plans; that he protested against this claimed indebtedness, saying that the arrangement was that he was to have free architect's services; that at this time his bank deposit account showed that he had a total credit of $387; that a settlement of the dispute, as to architects' fees and as regards the amount defendants owed him on said bank deposit (exclusive of the $1,000 deposited with defendants on June 22, 1925) finally was arrived at; that in May, 1926, he received and accepted in settlement of said bank deposit of $387 only, a check of the Finance Corporation of $200, which he cashed; and that accompanying said check of $200 was the following voucher: "The Guardian Finance Corporation tenders you the attached check in full payment of invoices herein enumerated, viz, Balance of Bond Acc't, in full, $387; Less Plans, specifications and sales

architect's services" that "Taxation Loan was introduced by Kingdon, the retained architect of defendants, and thereafter he had many interviews with them, and a first set of plans and sketches was submitted to him; that these were not satisfactory and others were drafted and submitted and changes made; that in November 1919, after he received a letter, signed by the "Home Building of America" giving an itemized estimate of the cost of the proposed house, which totalled $9,340 "not including a portion, of the Home Builders' fee of 8%, or other incidental expenses;" that he then refused to build, saying he could not afford to put such an amount into the house, suggested making other changes which would reduce the cost; that other interviews were had with Fowell and Morrison, and that an estimate for a house costing approximately $6,000, plus said 8% fee, was submitted, and that finally in the spring of 1920, at an interview had with Fowell and Morrison, "Morrison said that he "had been" too "[illegible] to wind up" matters; that he was informed that he must reimburse them for drafting plans; that he protested against this charge notwithstanding, saying that the arrangement was that he was to have free architect's services; that at this time his bank deposit account showed that he had a total credit of $[illegible]; that a settlement of the dispute, as to architects' fees and as regards the amount defendants owed him on said bank deposit (exclusive of the $1,500 deposited with defendants on June 22, 1919) finally was arrived at, and in May, 1920, he received and accepted in settlement of said bank deposit of $507 only, a check of the American Finance Corporation of $507, which he cashed; and that accompanying said check is the following voucher: "The American Finance Corporation tenders you the attached check in full payment of Kingdon Estate accounts, viz. balance of bank deposit, in full, $507; less plans, specifications and sale

commission, $187; Balance $200. The endorsement of this check acknowledges settlement in full of the within account." Thurston testified further that at these interviews in May, 1926, and subsequently, he also demanded the return of the $1,000, which he had deposited in June, 1925, but that these demands were refused. The testimony of Fosdal and Morrison was to the effect that at the interview, when the settlement of plaintiffs' $387 bank account was arranged, Thurston stated that he would leave said $1,000 with defendants, as he wanted to retain the forty "Beneficial Interests" as an investment. Thurston denied that he made any such statement.

Plaintiffs' evidence further disclosed that there were negotiations and correspondence in June, 1926, between plaintiffs' attorney and said Brelin, representing defendants, as to the return to plaintiffs of said $1,000, during which negotiations plaintiffs' attorney, on their behalf, tendered the return of said certificate or receipt, No. 711, dated June 24, 1925, and issued by said Investment Trust. Nothing resulted from the negotiations. During the trial plaintiffs again made formal tender to defendants of said certificate or receipt, but the tender was refused by defendants. Plaintiffs also introduced in evidence a certificate of the Secretary of State of Illinois, dated June 23, 1926, certifying in substance that the Home Builders Investment Trust had not filed in his office any statements or documents in compliance with the Illinois Securities Law. Plaintiffs also introduced in evidence two other certificates of said Secretary of State, dated June 28, 1928, to the same effect as to the Guardian Finance Corporation and the Home Builders of America. Plaintiffs also introduced in evidence two instruments, partly printed and partly in typewriting and bearing the signatures of Hawkins and Burningham as president and secretary, respectively, of the Investment Trust. The instruments are respectively numbered

[illegible] Nelson Bay. The statement of this state[illegible] acknowledges satisfaction in full of the [illegible]." Thereafter testified further that it [illegible] interviews in May, 1941, and subsequently, he also [illegible] the return of the [illegible] and deposited in June, 1942, and that there [illegible] were returned. The testimony of Tooral and Tourison was to the effect that at the interview, when the statements of plaintiff were [illegible] was surprised, therefore there be some [illegible] difference, so he [illegible] as an investment. Therefore claims [illegible]

Plaintiff's evidence tended [illegible] misrepresentations and correspondence in June, 1942. Defendant plaintiff's attorney and said Smith, representing defendants, on to the [illegible] to plaintiff of said $1,000, during which misrepresentations plaintiff's attorney, on their behalf, [illegible] or receipt, No. 711, dated June 24, 1942, and signed by said investment firm. Nothing resulted from the [illegible] the total plaintiff [illegible] certificate or receipt, but the [illegible] by defendants.

Plaintiff also introduced in evidence a [illegible] of the secretary of state of Illinois, under date [illegible] that the Home Building Investment [illegible] any statements or [illegible] Illinois Securities Law. Plaintiff also introduced in evidence the minor certificates of a [illegible] of [illegible] dated [illegible], 1941, to the effect [illegible] to the Building Finance Corporation and the [illegible] of [illegible]. Plaintiff also introduced in evidence the testimony, [illegible] and [illegible] in [illegible] and [illegible] the [illegible] of Banking and Knowledge of [illegible] and [illegible], [illegible] of the investment firm. The testimony [illegible]

1639 and 3874 and dated June 1st and September 1st, 1927, and were received by plaintiffs through the mails about the times as dated. Each is headed "Trustees' Home Builders Investment Trust Dividend Warrant." In the first it is stated: "This warrant is issued as dividend on beneficial interests and bonds of the Trustees, declared on May 31st, 1927, and payable on or before June 1st, 1928. Therefore said Trustees hereby agree to pay to Edwin and Amanda Thurston at the office of the Trustees, 734 North LaSalle Street, Chicago, Illinois, on or before June 1st, 1928, exactly twenty-two ($22) dollars, it being understood that this is at the rate of 55¢ per interest or unit. This warrant may be redeemed or used to apply on the purchase of any property that the Trustees may from time to time have for sale, or may be used at the option of the Trustees as a credit upon any account due and payable to the Trustees, at the rate of 50¢ per interest or unit." In the second of these instruments the wording is the same except that the dividend is said to be declared on "August 31st, 1927," and is "payable on or before September 1st,1928."

Plaintiffs' counsel contended upon the trial, and here contends, that under all the facts and circumstances in evidence plaintiffs are equitably entitled, in the present action of assumpsit with common counts, to recover back from defendants the $1,000, paid to defendants on June 22, 1925; and that if it be contended that said certificate or receipt of said Investment Trust, dated June 24, 1925, and referring to said "Forty Beneficial Interests," is evidence that defendants then sold to plaintiffs, said Beneficial Interests (i.e., some kind of a security), still plaintiffs are entitled to recover back the $1,000 in the present action, and for the reason that defendants in issuing said certificate or receipt and selling said Beneficial Interests did so in violation of the

Illinois Securities Law. The contentions of defendants' counsel are to the contrary. After a somewhat careful review of the evidence, and considering all the circumstances disclosed, we are of the opinion that counsel's contentions are meritorious, that the verdict of the jury is amply supported by the evidence and the law and that the judgment entered thereon against defendants for $1,000 should be affirmed.

In the recent case of National Malleable Castings Co. v. Iroquois Steel and Iron Co., 333 Ill. 588, our Supreme Court, in discussing the action of assumpsit, with the common counts, as a remedy, referred to the opinion in Highway Commissioners v. City of Bloomington, 253 Ill. 164, and said (p. 595): "It was there held that the action was an appropriate remedy to enforce the equitable obligation arising from the receipt of money by one person which belongs to another and which in equity and justice should be returned. Although the action is in form ex contractu, the alleged contract is purely fictitious and the right of recovery is governed by principles of equity and no privity of contract is necessary. The action may be maintained in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which ex aequo et bono belongs to another. The right to recover is governed by principles of equity although the action is at law." In Caldwell v. Cole, 326 Ill. 502, after referring to section 37 of the Illinois Securities Law, it is said (p. 504): "This section declares void every sale made in violation of any provision of the law. Every such sale or contract for sale was prohibited and no rights were acquired under it. (Morrison v. Farmers' Elevator Co., 319 Ill. 372.) By such a transaction the purchaser acquired nothing, and whatever the seller received was received without consideration. Without regard to the statute he was therefore liable to the purchaser, in an action

Illinois Constitution bars. The statutory of interpretation' tendency are to the contrary. After a searching review of cases on the subject, and considering all the circumstances involved, we are of the opinion that General's contentions are meritorious, that the verdict of the jury is amply supported by the evidence and the law and that the judgment should be affirmed.

In the recent case of Brilliant v. Kirby Lumber Co., 7, Irreparable injury and inadequate, are well cited, and against which to discourage the action of consumers, also the common counsel, is a remedy, reference to the opinion in Harper v. Adkins, 160 N.C. Discontinued, 267 III. 328, cal. 2d. 1964. "It was there held that the action was an interpretive remedy to secure the equitable difficulties arising from an insolvent or money by and against which belongs by another and which to equity and justice should be transmed. (Citing) the action of is from to consulting, the filing complaint is merely intended the the right of property is protected by principles of equity and the liability of contract is mechanically. The action may be maintained in all cases where the factor has conveyed money or its equivalent under such circumstances that in equity and good conscience it would not be right to retain it and which ex equipo or ex bonorum in justice. The right to recover is governed by principles of equity although the action is at law." In Dalzell v. Cohn, 326 Ill. 324, 326. After referring to section 17 of the Illinois Uniform Law, 65 ILS 1963. "This section contains exactly the same rule in relation to the principles of the law. Every act made or contract for sale was prohibited and no rights were acquired under it. (Harrison v. Hammond Clothing Co., 324 Ill. 329.) By such a transaction the principal contract nothing, and delivery the seller creditor and involved illegal consideration. Plaintiff legend to the statute he was therefore liable to the purchaser, in an action

for money had and received, for the money paid as the purchase price of the stock. The words of the statute added nothing to the liability which existed by reason of the void character of the contract." In paragraph 1 of said section 37 of said Securities Law it is provided that "every sale and contract of sale made in violation of any of the provisions of this Act shall be void at the election of the purchaser, and the seller of the securities so sold, the officers and directors of the seller, and each and every solicitor, agent or broker of or for such seller, who shall have knowingly performed any act or in any way furthered such sale, shall be jointly and severally liable, in an action at law or in equity, upon tender to the seller or in court of the securities sold, to the purchaser for the amount paid, the consideration given or the value thereof, together with his reasonable attorney's fees in any action brought for such recovery." In paragraph 5 of said section 37 it is provided that "in any prosecution, action, suit or proceeding before any of the several courts of this State, based upon or arising out of or under the provisions of this Act, a certificate * * by the Secretary of State, showing compliance or non-compliance with the provisions of the Illinois Securities Law, * * shall constitute prima facie evidence of such compliance or of such non-compliance with the provisions of this Act, as the case may be, and shall be admissible in evidence in any action at law or in equity to enforce the provisions of this Act." From the definitions of the different classes of securities as mentioned in other sections of the Act it is apparent that said "Beneficial Interests," claimed by defendants to be some kind of a security, can only be classified as in the "D" class. In section 8 of the Securities Law, it is provided that "all securities other than those falling within Class 'A', 'B' and 'C', respectively, shall

for money and any tangible, for the most part on the purchase price of the stock. The terms of the statutory section relating to the liability which attaches by reason of the sale thereof of the contract." In paragraph 2 of said section 37 of the Securities Act it is provided that "every sale and contract of sale made in violation of any of the provisions of this act shall be void as to the election of the purchaser, and the seller of the security so sold, the salesman and agent of the seller, and each and every officer, agent or broker of or for such seller, who shall have knowingly participated in and or in any way materially aided, shall be jointly and severally liable to an action in law or in equity, open thereto to the owner of the security so sold, or to the purchaser for the amount paid, the consideration given or the value thereof, together with all reasonable attorney's fees in any action brought for such recovery." In paragraph 3 of said section 37 it is provided that "in any prosecution, action, suit or proceeding before any of the several courts in this state, based upon or arising out of or under the provisions of this act, or certificate * * by the commissioner of state, showing compliance or non-compliance with the provisions of the Illinois Securities Law, * * shall constitute prima facie evidence of such compliance or of such non-compliance with the provisions of this act, as the case may be, and shall be admissible in evidence in any action at law or in equity to enforce the provisions of this act." From the definitions of the different classes of securities as mentioned in other sections of the act it is apparent that with "Beneficial Interests," claimed by defendants to be some kind of a security, can only be classified as in the "A" class. In section 4 of the Securities Act, it is provided that "all securities other than those falling within class "A", "B" and "C", respectively, shall

be known as securities in Class 'D'." And in section 9 it is prohibited that any security in Class "D" shall be sold or offered for sale until certain specified statements and documents shall have been filed in the office of the Secretary of State. And the certificates of the Secretary of State, introduced in evidence, disclosed that none of the defendants had complied with the provisions of said section 9 as to the filing with him of such statements and documents.

In the present case it appears that when, in March, 1925, upon O'Neill's solicitation, plaintiffs made their first deposit of $200 with defendants for the purposes mentioned, they signed and delivered a so-called "original application, No. B-3315." In our opinion this instrument, with the many "conditions and privileges" made a part thereof, is very indefinite and uncertain. It is not made clear what plaintiffs were to get for the money deposited, or for their monthly deposits of moneys to be made thereafter. A similar application or contract was considered in the case of Kopp v. Guardian Finance Corporation, No. 31024, in which the first division of this appellate court affirmed a judgment against said corporation. In the unpublished opinion in the Kopp case, filed November 29, 1926, the court said: "In our opinion the alleged contract is on its face so indefinite, uncertain and unintelligible that it is incapable of being enforced."

Defendants' counsel further contend that the trial court committed error in refusing to admit certain offered evidence of defendants which tended to show that said sale of the Forty Beneficial Interests to plaintiffs was "exempt as Class B stock," under the provisions of section 6 of the Securities Law, in that said sale was an "isolated" one by a bona fide owner (Mrs. George Livings) of said Interests for her own account. In our opinion the offered evidence

did not tend to prove any such thing. Furthermore, the receipt of defendants' cashier (Hegar) given to plaintiffs for their $1,000, on June 22, 1925, as well as the receipt or certificate issued by the Investment Trust as to said Forty Beneficial Interests, shows that the money was received by defendants for said Interests and not by Mrs. Livings.

Counsel further contend that the court erred in admitting certain evidence offered by plaintiffs. We have considered the several points but do not think that such errors were committed as warrant a reversal of the judgment.

For the reasons indicated the judgment of the Superior court is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

did not stand to prove any such claim. Furthermore, the results of defendants' counter (theory) cannot be considered for their benefit, as June 22, 1927, is not an "exciting or controlling factor" in the investment trust as is said in "Institutional Investors, where that the money was received by [illegible] for [illegible] and not by Mr. Irving.

Counsel further contend that the court erred in admitting certain evidence offered by plaintiff. It does appear that several points set out and which have been considered the [illegible] as harmless a reversal of the judgment.

For the reasons indicated the judgment of the superior court is affirmed.

[illegible]

Conlan and Barnes, JJ., concur.

33046

252 I.A. 542

C. H. TESEYCK,
Appellee,

vs.

J. B. SWANSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

154 A

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

About 6:15 p. m., January 13, 192., after dark, defendant's automobile while going west on Surf street, Chicago, ran into plaintiff's automobile parked close to the north curb of said street. At the time other cars were parked along said curb in front of and back of plaintiff's car and along the curb on the opposite side of the street. On account of the narrowness of the street passing automobiles had to keep close to the line of parked cars on the side of the street they were driven.

From a judgment against him for $286 assessed as damages to the automobile, for which the suit was brought, defendant has appealed.

There was no material conflict in the evidence. It was sufficient to make a prima facie case of negligence on the part of defendant. Aside from its sufficiency the only point made is that the court should have granted a continuance under the circumstances.

The trial was before the court without a jury. When the case was called for trial defendant had not appeared in court. His arrival being expected the case was passed and later in the day called again, when he not having arrived his counsel asked for a continuance and handed some affidavits to the court. They are not preserved in the record and we cannot assume that they showed sufficient ground for a continuance. Thereupon the court remarked: "We will go ahead and try it as far as we can." To this defendant excepted.

That the court said it would go on as far as it could did not necessarily imply an intention to wait indefinitely for defendant's arrival or to grant a continuance if he did not appear in reasonable time. No legal ground was shown for a continuance, and the circumstances do not indicate an abuse of the court's discretion in refusing it.

None of the witnesses saw the accident. But the facts as above stated were made to appear by the testimony of plaintiff's witnesses and also that there was a coal pile about 20 to 25 feet to the rear of plaintiff's car which extended from the parkway to 2 or 3 feet beyond the line of the parked automobiles. No light was on the pile of coal, on which two men were working. There was, however, a street lamp nearby. Defendant called one witness who testified that the coal pile was 20 to 50 feet from plaintiff's car. The court then asked defendant's counsel for his theory of the case. He replied that owing to the parking of the cars on the narrow street, as aforesaid, defendant had to keep close to the north line of parked cars as possible and while proceeding "at about 20 miles an hour" his front wheels struck the coal pile and caused him to lose control; that it caused his foot to be thrown from the brake and the car to swerve a little south, and that when the hind wheels struck the coal pile his car swerved to the north and ran into plaintiff's. Thereupon the court expressed the opinion that the statement did not constitute a good defense. The court may well have found that the admitted speed with which defendant's car was driven after dark through such a narrow passage for moving vehicles was negligence and the proximate cause of the injury.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

33064

HENRY H. KARCH,
Appellee,

vs.

HENRY SCHRIK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

155 A

252 I.A. 642

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $800 in favor of plaintiff in an action to recover a real estate commission.

The case comes before us a second time. In the former appeal from a like judgment we held in our opinion filed therein April 3, 1928, that the verdict was against the weight of the evidence. But there were some facts and circumstances in that case that do not appear in this.

The only undisputed fact at issue was whether defendant agreed to pay the commission. His brother-in-law was the owner of the property and absent in Holland at the time defendant undertook to negotiate a sale of the property through plaintiff's agent. The negotiations were verbal and between plaintiff's agent and defendant at the bank of which the latter was president and his son, John, vice-president. It was agreed that plaintiff as said agent produced a purchaser who was ready, able and willing to buy the property at the price submitted, namely, $16,000. Subsequently defendant informed plaintiff that the land wasnnot for sale.

Plaintiff's agent who conducted the negotiations, and a customer he brought to defendant both testified to an express promise on the part of defendant to pay $800 as commission in case of his procuring a purchaser of the property for $16,000. Defendant denied making the promise and claimed that his brother-in-law left the matter of the sale of the property in the hands

of his said son John, and that aside from referring plaintiff's agent to his son he had no interest in the transaction. Defendant's son was not called as a witness and it does not appear that any conference was had with him. That defendant conducted all negotiations with plaintiff's agent is not denied, and he admitted that he told plaintiff's agent to try to get a buyer and may have added, "there is a commission." Plaintiff's agent testified that defendant said his brother-in-law had left with him an unrecorded deed by which title could be passed and that defendant had authority in the matter. This was not denied. Defendant's testimony was mainly to the effect that he did not promise personally to pay the commission.

There were no circumstances in the case that had any special tendency to support the testimony of either side as to the alleged promise. As submitted to the jury on the single issue of whether there was such a promise the case stood on the testimony of two witnesses against one, who, so far as the record discloses, are equally reputable, and there being no inherent improbability in the testimony of either side we will in such a case recognize the superior advantage the jury had from hearing and observing the witnesses to determine their credibility and will not disturb the verdict.

Appellant contends our former opinion is controlling and that the court should, therefore, have entered a judgment for the defendant non obstante veredicto or in arrest of judgment. While there were facts and circumstances testified to in the former trial which we thought had a tendency to support the defense and which are not in this record, yet where, as here, the case reduces itself to determining merely the credibility of the witnesses and a jury has twice had the opportunity of seeing and hearing them and found a like judgment both times we are not

disposed to disturb the same. Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party except for errors of law. (Louisville & Nashville R.R.Co. v. Woodson, 134 U. S. 604, 623. 14 Ency. P. and Pr., 993; Brown v. Paterson Parchment Paper Co., 62 N. J. L. 474.)

Authorities are cited by appellant as to the liability of an agent when he conceals his principal or where the vendor is put on inquiry as to his authority. They have no particular application to the instant state of facts. This is not a case where the defendant is sought to be held on the theory of concealing his principal but where he expressly promised the plaintiff that he personally would pay the commission. In such a case the plaintiff is not compelled to look to the principal but may hold the agent on his express promise.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

Gurvitch, G. Les Cadres Sociaux, s.l., Gallimard.

33073

MESSINGER PAPER COMPANY,
a corporation,
Appellant,

v.

EQUITY PRINTING & TYPESETTING
COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court vacating a judgment against the Equity Printing & Typesetting Company and denying a motion to set aside the order of vacation.

September 13, 1926, a judgment was entered by confession against said company and Industrial Workers of the World, an alleged corporation, on two judgment notes of which the former was the maker, and the latter an apparent endorser. December 14, 1926, the latter filed a motion, supported by affidavits, to vacate and set aside the judgment against it, claiming that it was an association and not a corporation and that its said endorsement was not authorized. An order was entered the same day opening up the judgment as to the Industrial Workers of the World only, as we construe it, and to permit the affidavit in support of its motion to stand as its affidavit of merits.

December 21, 1926, the property of the Equity Printing & Typesetting Company was sold by the bailiff of the Municipal court under an execution issued on the day of the judgment, and the proceeds of the sale, amounting to $1422.30, was applied on account of the judgment.

[illegible]

[illegible] a corporation,
[illegible],

v.

[illegible] & [illegible]
[illegible], a corporation,
[illegible].

[illegible]. [illegible] FOR [illegible].

This is an appeal from an order of the Municipal Court vacating a judgment against the [illegible] & [illegible] Company and denying a motion to set aside the order of vacation.

September 14, 1918, a judgment was entered by default against said company and [illegible] of the [illegible], as alleged [illegible], on the judgment notes of which the latter was the maker, and the [illegible] an [illegible]. October 14, 1918, the latter filed a motion, supported by affidavits, to vacate and set aside the judgment against it, alleging that it was an association and not a corporation and that the [illegible] was not authorized. The order was entered the same day granting the judgment as to the individual interests of the [illegible], so as [illegible] it, and to permit the affiants to appear at the [illegible] and as the affidavit of merits.

December 21, 1918, the company of the [illegible] filing a [illegible] was sued by [illegible] at the [illegible] under an [illegible] issued on the day of the judgment, and the [illegible] of the suit, according to [illegible], was applied on account of the judgment.

December 22, 1926, one Frank Fiorite, claiming to be a creditor of the Equity Printing & Typesetting Company (referred to hereinafter as defendant) filed an intervening petition, and later, amendments thereto, claiming to have a prior lien on the property of defendant.

The motion of the Industrial Workers of the World to vacate the judgment against it and the petition of Fiorite were continued from time to time, and on December 29, 1927, the former was allowed and said petition was, on plaintiff's motion, stricken from the files.

It appears that Fiorite filed a creditor's bill a few days later in the Circuit court of Cook county under which the Chicago Trust Company was appointed receiver of defendant with the usual powers, the order authorizing and directing it to appear in the Municipal court in this cause to move to vacate the judgment against defendant, and on April 27, 1928, pursuant to such order the receiver filed a petition to vacate said judgment, the one now under consideration.

The grounds set up in support of the petition are that said Fiorite purchased the property at the judicial sale subject to disputed liens; that the judgment was a disputed claim; that the notes on which the judgment was confessed are not in truth and in fact notes of defendant; that they were signed by persons without authority to execute them and are null and void; that the court was without jurisdiction of defendant to enter said judgment; that the vacation of the judgment on the motion of the Industrial Workers of the World operated to vacate the entire judgment.

The petition is filed under the provision of section 21

December 22, 1926, one Frank Morris, claiming to be a creditor of the Realty Finance, a Tennessee Company (referred to sometimes as defendant) filed an intervening petition, and later, announced himself, claiming to have a prior lien on the property of defendant.

The motion of the receivers (owners of the land) to vacate the judgment against it and the petition of Morris were sustained (in time by law), and on December 27, 1927, the former was allowed and the petition was, on substantially several grounds from the filing.

It appears that Morris filed a mandamus suit a few days later in the Chancery Court of Shelby County, upon which the Chicago Title Company was guaranteed insurance of defendant with the usual penalty, the order authorizing the filing to be issued in the municipal court in this county to move to vacate the judgment against defendant, and on April 17, 1928, succeeded in such order the receiver filed a petition to vacate his judgment. The one now under consideration.

The grounds set up in support of the petition are that said Morris produced the property at the judicial sale subject to disputes liens; that the judgment was a disguised order; that the notes on which the judgment was rendered are not in truth and in fact notes of corporations; that they were signed by persons without authority to execute them and are null and void; that the court was without jurisdiction of defendant to enter such judgment; that the revision of the judgment on the notes of the unauthorized officers of the Realty operated to vacate the entire judgment.

The petition is filed under the provisions of section 21

of the Municipal Court Act conferring equitable powers upon that court to vacate and set aside a judgment on grounds that would be sufficient to cause the same to be vacated and set aside by a bill in equity. Hence it must be considered upon principles applicable to such a bill. It does not attempt to disclose that the defendant was not indebted to plaintiff to the amount of the judgment confessed or that defendant had any meritorious defense to the action, or that there would be a different result on another trial at law. It was said in Reed v. N. Y. Exchange Bank, 230 Ill. 50:

> "It is a well settled rule of law in this State that courts of equity will not interfere to prevent the collection of a judgment, even though the judgment was rendered without service of process, unless a meritorious defense be shown. It would be useless to set aside a judgment at law unless it is shown that there would be a different result upon another trial at law."

Besides, if the judgment was to be disturbed at all, the order should have been to open up the judgment and not to vacate it on an ex parte affidavit or petition.

However, if as is the effect of the petition, it be admitted that defendant was indebted to plaintiff, then being purely an equitable proceeding and lacking the essential element of a meritorious defense, the other grounds of the petition need not be considered. In Hier v. Kaufman, 134 Ill. 215, the court held that it would not relieve against a judgment entered without authority where it appears that the debtor owes the amount of the judgment, and has no defense, either legal or equitable, to the debt for which the judgment was rendered. (p. 226.) It said:

> "This principle applies not only where the application to set aside the judgment is made by the debtor, who claims that he was not served with process, or gave no authority to confess judgment, but also where such application is made by a creditor or other third person."

of the municipal court not constituted substantially under that court to vacate one and enter a judgment on grounds that would be sufficient to cause the court to be vacated and set aside in civil an county. Hence it must be concluded upon principles applicable to such a bill. It does not appear in proper to grounds upon the defendants was not invested in substantial to the course of the judgment conferred on that defendant has by contributing authority to the action, or that there would be a different result or another trial at law. It was held in Ryan v. [illegible] Insurance Co., 120 Ill. 62:

> "It is a well settled rule of law in this State that courts of equity will not interfere to prevent the rendition of a judgment, even though the judgment was rendered without service of process, unless a meritorious defense be shown. It would be useless to set aside a judgment at law unless it be shown that there would be a different result upon another trial at law."

Besides, if the judgment was to be disturbed at all, the order should have been to open up the judgment and not to vacate it or as the party activity or petition.

However, if as in the answer of the petition, it is assumed that defendant was entitled to plaintiff, then being merely an equitable proceeding the judgment the essential element of a meritorious defense, the other grounds of the petition need not be considered. In Miller v. Stokes, 114 Ill. 112, the court said that it would not relieve against a judgment rendered without authority where it appears that the defendant was the amount of the judgment, and has no interest, either legal or equitable, in the suit for which the judgment was rendered. (p. 124.) It said:

> "This principle applies not only where the application to set aside the judgment is made by the debtor, who claims that he did not accept with process, or gave no authority to confess judgment, but also where such application is made by a creditor or other third person."

It matters not, therefore, whether the petition be considered as one by the defendant or by a third person.

It is contended by counsel for appellee that the judgment being a unit the order setting it aside as to the Industrial Workers of the World operated to vacate the entire judgment. While this case does not come within the exceptions to the rule referred to in Lewis v. Conrad Seipp Brewing Company, 63 Ill. App. 345, the court there said:

> "This is, as a rule, true on appeal from error alleged as to the rendering of the judgment itself. In an application to set aside a judgment by confession, an appeal is made to the equitable as well as law powers of the court, and the court proceeding upon equitable principles, may remove the judgment as to some and allow it to stand as to others."

But in the case at bar no jurisdiction was acquired of defendant Industrial Workers of the World. It did not sign the power of attorney under which the court acquired jurisdiction to enter judgment against the other defendant. The repudiated endorsement even if valid did not carry with it the right to confess judgment under such power of attorney which was binding only on the maker of the note.

In Price v. Marie, 207 Ill. App. 112, the court acquired jurisdiction of only one of two makers of a promissory note on which the action was brought. A judgment against both was entered but subsequently vacated as to each. It was held to be valid against the defendant of whom the court had jurisdiction and was allowed to stand as to him.

We think the court erred in vacating the judgment and in refusing to set aside the order. The order of vacation will be reversed and the cause remanded with directions to expunge the same.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Scanlan, J., concur.

It matters not, therefore, whether the petition is considered as one by six defendants or by [illegible] persons.

It is commended by counsel for appellee that the judgment being a mere nullity it ought to be so declared [illegible] authority of the Court exercised to vacate the nullity [illegible] while this case does not have within the exception in the [illegible] reference to Ex Parte [illegible], [illegible] Ala. 369, the court there said:

> "This is not a nullity upon an appeal from a judgment rendered in the exercise of the jurisdiction of the Court. In an application for a writ which is made to the supreme court, or to the court upon which the judgment is to be made, it is proper to consider the question of jurisdiction, and to see that the judgment is not a nullity."

But in the case at bar no jurisdiction was assumed of defendant individual "citizens of the United." It did not claim the power to "discover" under which that would [illegible] to enter judgment in such the other citizens. The judgment was void, even if valid did so, every time it is alleged to have judgment under such power of "discovery" which was limited only by the motion of the [illegible].

In Ex Parte [illegible], [illegible] Ala. 24, the court reviewed jurisdiction of such use of the [illegible] of a preliminary [illegible] which the action was brought. [illegible] [illegible] but correspondingly [illegible] [illegible] [illegible] against the defendant of [illegible] [illegible] [illegible] allowed to stand as to [illegible].

We think the court erred in vacating the judgment [illegible] entering in lieu thereof the order. The writ of mandamus will be issued [illegible] the order complained will [illegible] [illegible] [illegible] [illegible].

DISMISSED [illegible] WITH DIRECTIONS.

Gridley, P. J., and Simpson, J., concur.

33082

SAMUEL PATROWICH,
Appellee,

v.

IRVING SYSTEM CLOTHES COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

258 I.A. 642

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against defendant for $1,578.56 entered on the default of defendant for want of an affidavit of merits.

The plaintiff's statement of claim is predicated on an indebtedness in said sum on two grounds; (1) on the sale and delivery of goods, wares and merchandise to defendant at its request in the sum of $5,280.75, on which defendant was credited with $3,702.19, leaving a balance of $1,578.56, as particularly set forth in an attached copy of the account; and (2) on an account stated for said balance.

Defendant's first affidavit of merits was stricken and it was ordered to file an amended affidavit of merits. It then denied the indebtedness as set forth in said attached copy of account or in any sum whatever, and any demand, refusal or neglect to pay the same, or an indebtedness on an account stated in the sum of $1,578.56, and alleged that it was indebted in the sum of the credits allowed in the statement of account and had paid the same as therein stated.

On plaintiff's motion the amended affidavit of merits

33082

SAMUEL NATHANIEL,
Appellee,

v.

IRVING CENTER CORPORATION,
CONTRACT, a corporation,
Appellant.

Mr. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against defendant for $1,372.56 entered on the default of defendant for want of an affidavit of merits.

The plaintiff's statement of claim is predicated on an indebtedness in said sum on two counts: (1) on the sale and delivery of goods, wares and merchandise to defendant at its request in the sum of $1,[illegible].77, on which defendant was credited with $[illegible].14, leaving a balance of $1,372.56, as particularly set forth in an attached copy of the account; and (2) on an account stated for said balance.

Defendant's first affidavit of merits was stricken and it was ordered to file an amended affidavit of merits. It then dunked the inadequacies as set forth in said stricken copy of account or in any sum whatever, and any demand, refusal or neglect to pay the same, or an indebtedness on an account stated in the sum of $1,372.56, and alleged that it was indebted in the sum of the credits allowed in the statement of account and had paid the same as shown stated.

On plaintiff's motion the amended affidavit of merits

was stricken, and defendant electing to stand by the same, judgment in the sum of said balance was entered.

While the defendant formally denied any indebtedness it did not deny the sale and delivery of merchandise on which the original indebtedness in the sum of $5,280.75 is alleged to have arisen.

The rules of the Municipal court are in the bill of exceptions. The rules of pleading to be observed in said court appear in rule 15. Paragraph (k) thereof provides that "every allegation of fact in any pleading, except allegations of unliquidated damages, if not denied specifically or by necessary implication in the pleading of the opposite party, shall be taken to be admitted, except as provided by rule 19." Said rule 19 relates to the joinder of issue after the filing of an affidavit of merits and has no application to the facts of this case. Paragraph (c) of said rule 15 provides: "It shall not be sufficient to deny generally the grounds for relief alleged in the statement of claim, set-off or counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth; but the court may grant leave, where it may be just, to plead a general denial." No such leave was granted in this case. The rule goes on to provide that "in first and fourth-class cases for the recovery of money only, the defendant shall, if he makes a defense, file an answer, which shall be an affidavit sworn to by himself, his agent or attorney," and that "such affidavit shall contain a concise statement of the ultimate facts constituting the defense." Rule 18 provides that the affidavit of merits shall be filed in first-class cases in lieu of pleas provided for in the Municipal Court Act, and that if defendant fails to file an affidavit

[illegible] statement, and statement alleged to have by the [illegible] [illegible] in the case or said balance was [illegible].

[illegible] defendant, formally denied the [illegible] did not deny the sale and delivery of merchandise as [illegible] original indebtedness in the sum of [illegible] is alleged to have [illegible].

The rules of the municipal court are in the [illegible] exceptions. The rules of pleading in the municipal [illegible] appear in rule 10. Paragraph (b) thereof provides that "every allegation of fact in any pleading, except those claims of unliquidated damages, if not denied specifically or by necessary implication in the pleading of the opposite party, shall be taken to be admitted, except as provided by rule 17." Rule rule 17 relates to the joinder of issues after the filing of an answer, of pleading and has no application to the facts of this case. Paragraph (a) of said rule 10 provides: "It shall not be sufficient to deny generally the grounds for relief sought in the statement of claim, counter-claim or cross-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, but the court may grant leave, where it may be just, to plead a general denial." In such cases the pleader in this case. The rule goes on to provide that: "In filed the interpleader cases for the recovery of money only, the defendants could, if so minded, defense. Like an answer, which would be an individual matter in by itself, the issues or attorney, are that upon [illegible] contain a concise statement of the ultimate facts constituting the defense." This is provided that the defendants of matter shall be filed in line or place provided for in the municipal court act, and that if defendant fails to file an affidavit

of merits such as is required by the rules of said court the plaintiff shall be entitled to default and judgment upon his affidavit of claim filed in the case, or upon such further evidence as the court may require.

The stricken affidavit of merits manifestly does not conform to these rules, and under the last mentioned rule the court was authorized to enter said judgment upon "hearing the evidence contained in the affidavit of plaintiff's claim filed herein," as was recited in said order. It does not deny a sale and delivery of merchandise to defendant "in the sum of $5,280.75," thereby under the rules admitting a sale and delivery thereof in said sum, nor does it by thus admitting such sale and delivery set forth the nature of any defense defendant has to the amount of plaintiff's claim. It is in effect merely a general denial of indebtedness, which is not sufficient under the rules, and states no defense whatever to the balance claimed for goods sold and delivered to defendant at its special instance and request.

Under the practice of the Municipal court the affidavit of merits was properly stricken.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

of merits such as is required by the rules of this court. The plaintiff must be entitled to evidence and judgment upon the affidavit of claim filed in the cause, or upon such further evidence as the court may require.

The academic affidavit of merits unnecessarily does not conform to these rules, and unless the last mentioned rule the court has authority to enter such judgment upon "hearing the evidence contained in the affidavit of plaintiff's claim filed herein," as was recited in said order. It does not deal a single and definite of merchandise in dispute; the sum of $[illegible]. The thereby waive the rules requiring a full and definite interest in said sum, but does it by these conditions, such sale and delivery not fixed the nature of any defense defendant can be the amount of plaintiff's claim. It is in effect merely a general consent of indebtedness, which is not sufficient under the rules, and shows no reason whatever in the balance claimed to prove this and activeness in determining at its equally jurisdiction and judgment.

Under the practice of the municipal court a the affidavit of merits was properly stricken.

ORDER.

Orelay, P. J., and Lundin, J., concur.

33122

THEODORE WEINSHANK,
Appellee,

v.

FEDERAL LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

158 A

254 I.A. 543

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant seeks reversal of a judgment against it for $175 in an action on a health insurance policy issued by it against disease. The claim is predicated upon a provision for indemnity for continuous disability and necessary confinement in the house of not less than seven days or more than thirty weeks.

The statement of claim alleges that plaintiff was continuously disabled and confined for a period of six weeks beginning "December 20, 1927." The date claimed at the trial was December 9. The greater weight of the evidence shows that the true date was December 16.

Under the "standard provisions" the policy provides that written notice of sickness on which claim may be based must be given to the company within ten days after the commencement of disability or such sickness, but that failure to give such notice shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

Plaintiff gave notice of his disability through a letter from his wife dated January 9, 1928, saying that plaintiff "has been sick

[illegible]

THEODORE [illegible],
[illegible],

v.

[illegible] LIFE INSURANCE
COMPANY, a corporation,
[illegible].

MO. [illegible]

Appellant seeks reversal of a judgment against it for $175 in an action on a monthly insurance policy issued by it against disease. The block in predicated upon a provision for indemnity for sickness disability and necessary confinement in the house of not less than seven days or more than eighty weeks.

The statement of claim alleges that plaintiff was continuously disabled and confined for a period of six weeks beginning "December 30, 1937." The date claimed at the outset was December 1. The greater weight of the evidence shows that the true date was December 16.

Under the "Schedule provisions" the policy provides that written notice of sickness on which claim may be based must be given to the company within ten days after the commencement of disability or such sickness, but that failure to give such notice shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

Plaintiff gave notice of his disability through a letter from his wife dated January 9, 1938, saying that plaintiff "has been sick

since December 9th. He is still under doctor's care," and undertook to establish that date. But in his final proof presented to defendant January 23, 1928, and again in his proof presented to another insurance company February 3, 1928, for an accident claim, it was stated both by plaintiff (under oath) and his attending physician that plaintiff was suffering from traumatic lumbago caused by an accident December 16, 1927, and that that was the date of the beginning of his illness and confinement.

But it is immaterial which date be accepted if plaintiff cannot be excused from fulfillment of his obligation to give defendant the notice required by the policy. The only excuse offered by him for not giving such notice until twenty-four days from December 16, or thirty-one days from December 9, was that he was ill and could not leave the house. But it cannot be said that it was not reasonably possible to give notice before January 9, merely because of confinement to his house by such illness. It does not appear that he could not write or dictate a notice or send it by another. No impossibility to prepare and transmit a notice within ten days from the commencement of the disability or as soon as possible thereafter was disclosed.

One of the provisions of the policy is that strict compliance on the part of the assured and beneficiary with all its terms and conditions is a condition precedent to recover thereunder, and that a failure in this respect will forfeit to the company all rights to any indemnity. As said in Norwaysz v. Thuringia Ins. Co., 204 Ill. 334, 342, "contracts of insurance are to be construed like other contracts." Under the terms of the policy defendant had the right to insist on the notice required therein as a condition precedent to the right of recovery if reasonably possible to give it. In Whiteside v. North American Accident

since December 6th. He is still with Mother's estate, and neces-
sary to retain his last date. But in his final proof presented on
December 7th by Mr. Ivey, and again on his proof presented to
another insurance company today by Mr. Ivey, he has indicated that
it was stated with Mr. Dunbar (whom with his consulting
physician that insanity was resulting from disease. Assume
caused by an accident between it, Mr. Ivey, we find this is the cause
of the beginning of his illness and unfitness.

Yet it is immaterial which side is assumed if insanity
cannot be excused from fulfillment of his obligation to pay premi-
ums the policy required by the policy. The only excuse offered by
him for not paying such is the until twenty-one days from December
10, or thirty-one days from December 6, and that he was ill and
could not leave the house. Yet it cannot be said that it was not
reasonably possible to give notice before January 7, merely by
sense of continuement to his house by such illness. It does not
appear that he could not write or dictate a notice or send it by
another. No impossibility to prepare and transmit a notice within
ten days from the commencement of the disability is shown or even
possible therefrom and circumstances.

One of the provisions of the policy is that strict
compliance on the part of the insured and beneficiary with all the
terms and conditions in a condition precedent to recover upon
under, and that a waiver in this respect will result to the company
all rights to any indemnity. As held in Mercantile v. Insurance
Inc. co., 2nd Ill. App. 242, "warranties of insurance are to be
construed like other contracts." Under the terms of the policy
defendant had the right to insist on the notice requiring insanity
as a condition precedent to the right of recovery if reasonably
possible to give it. In Whitehead v. North American Insurance

Insurance Co., 200 N. Y. 320, the insured was taken ill November 13, and was sick for the period of a month. During the early part of his sickness he was delirious and unable to remember that he had a policy and had fully forgotten it until about December 10, when he immediately gave notice to the company. The policy required notice of the disability within ten days thereafter and such notice was a condition precedent to recovery. The court held that under such circumstances he would not be relieved from fulfillment of the engagement which he had voluntarily undertaken, citing from Kerr on Insurance, p. 451, that "insurers have a right to designate the terms upon which they will become liable for a loss. * * * And when parties have made their own contract * * * and assented to certain conditions the courts cannot change them and must not permit them to be violated or disregarded." The court also said in that case that the notice might have been served by another person if the insured was disabled from personally so doing. There was a like ruling in Johnson v. Maryland Casualty Co., 73 N. H. 259, and in United Benevolent Society v. Freeman, 111 Ga. 355.

It is true that the courts have held that the insured would not be held to a strict compliance with the terms of a policy requiring notice under circumstances such as when given by an administrator of the insured, or where the insured has been unconscious or deranged or insane from the effects of an accident during the period when the policy required notice, but the case at bar does not come within that class of cases.

We think the judgment must be reversed for non-compliance with the provision requiring notice within ten days from plaintiff's disability in the absence of any showing that the notice was not given thereafter as soon as was reasonably possible. This conclusion obviates any necessity of considering other alleged grounds for reversal.

REVERSED WITH A FINDING OF FACT.

Gridley, P.J., and Scanlan, J., concur.

Insurance Co., 1[illegible] N.Y. 2d 200, the insured was [illegible] liability, and was also for the period of a month. During the [illegible] period of his absence, he was delivering and should be considered that he had a policy and had fully complied [illegible] when he inadvertently gave notice to the company. The policy contained notice of the liability which was [illegible] and thus entitled was a condition precedent to recovery. The court held [illegible] such circumstances he could not be relieved from liability of the insurance which is had voluntarily [illegible] on Insurance, p. 481, that "insurance law [illegible] forms upon which they will become liable [illegible] when parties have made their contract [illegible] certain conditions the courts cannot change [illegible] those to be binding on [illegible]." The [illegible] case that the notice might have been served by another person if the insurer was dissatisfied [illegible] relation in Jungen v. Spielman [illegible] United Insurance Co. v. Thomson, [illegible].

It is true that the courts have held that the [illegible] not be held to a strict compliance with the terms of a policy [illegible] notice under circumstances such as those arise by an misdelivery of the insured, or where the insured has been [illegible] or prevented from the efforts of an insured during the [illegible] policy required notice, but one must be [illegible] point of view.

To hold the insured must be [illegible] with the provision requiring notice would be [illegible] liability in the absence of any showing that the notice was thereafter as soon as was reasonably possible. This conclusion [illegible] necessity of considering other [illegible] Mutual [illegible] Insurance Co. v. Thomson, [illegible].

FINDING OF FACT.

We find that the commencement of appellee's confinement and disability was December 16, 1927, and that he failed to give notice to appellant of his disability within ten days from the commencement thereof or as soon as was reasonably possible for him to do.

Insurance Co., 101 S. E. 520, the insurer was held liable for damages to, and was sued for the period of 4 months. Only the small part of his attorney's fee and expenses was ordered to reimburse; the insurer had a policy and was fully responsible if [illegible] [illegible] when it immediately gave notice to the company. The policy requires notice of the disability within ten days thereafter and that notice was a condition precedent to recovery. The court held that in such circumstances he would not be relieved from liability to the insurance, which is not unreasonable, citing from Cox on Insurance, p. 631, that "insurers have a right to investigate and [illegible] upon which they will assume liability or not." [illegible] when parties have made their own contract [illegible] certain conditions the courts cannot relieve [illegible] from those to be violated or disregarded." The court also held in that case that the notice of its [illegible] by another person if the insurer was disabled [illegible] personally in [illegible] relied on Jungers v. Berkshire [illegible] 97 N. W. 1[illegible], and United Insurance Company v. Keener, 111 Ga. 1[illegible].

It is true that the insurer may not [illegible] the [illegible] not be held to a strict compliance with the terms of a policy [illegible] notice under circumstances such as those [illegible] by an adjustment of the insurance, or where the insurer has made representations or [illegible] insure from the effects of an accident during the [illegible] the policy requires notice, but the case is not [illegible] [illegible] clear of course.

In which the judgment must be reversed for [illegible] with the previous rulings making [illegible] from plaintiff's disability in the absence of any showing that [illegible] shortcoming on some or the reasonably possible. This conclusion [illegible] may necessarily of consideration [illegible] for [illegible] [illegible] Judgment [illegible] Fraser, J. [illegible] Gardner, J., and Tomlins, J., concur.

FINDING OF FACT.

We find that the commencement of appellee's confinement and disability was December 16, 1927, and that he failed to give notice to appellant of his disability within ten days from the commencement thereof or as soon as was reasonably possible for him to do.

33131

159

A

S. G. GEIGER,
Appellee,

v.

MARQUANDT MOTOR CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 643

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim herein is for recovery of $650, the value of one Dodge automobile given by plaintiff to defendant March 31, 1926, as partial payment for a new Packard automobile which plaintiff agreed to purchase and defendant to sell and deliver. The claim is predicated on defendant's failure and neglect to turn over the Packard automobile and its refusal to return the Dodge automobile.

Defendant admitted the agreement and averred that it tendered delivery of the Packard automobile and that plaintiff refused to accept it, and that it is still ready and willing "to secure an automobile of such style and type for plaintiff." The trial was without a jury and the court found for plaintiff and gave judgment for $650, from which defendant appeals.

The agreement was dated March 31, 1926. Defendant bought the Packard automobile April 30 from a dealer in Clinton, Iowa. May 3, according to defendant's testimony, or on June 20, according to plaintiff's, plaintiff called at defendant's salesroom and saw the car. Whichever date it was, plaintiff claims that the speedometer indicated that it had been driven 314 miles, and at the time the

tires showed usage of 2000 miles, and that it looked like a second-hand car. On those grounds he then refused to accept the car. Defendant introduced witnesses who claimed to have been present at the time and testified that they did not hear plaintiff complain of the tires. To his complaint about the distance it appeared to have been driven, defendant's salesman testified that he told plaintiff it was customary to drive in cars from the factory to save freight charges. Clinton, Iowa, is 150 miles from Chicago. There was no proof how the car reached the dealer in Clinton. Defendant did not undertake to prove that it had not been driven 314 miles or more, or that the tires had not received the usage plaintiff claimed. In fact, there was no proof that it was a new car but merely that defendant "understood" it was when purchasing it from the Iowa dealer.

June 26 plaintiff wrote defendant cancelling the contract for failure to deliver the car after the lapse of nearly 90 days from the date of the contract, and demanded $650 as the value of the Dodge car, which had been previously disposed of by defendant. Replying June 29, defendant stated that the Packard car had been ready for delivery for the past three months and unless plaintiff called at once and took it it would cancel the contract, forfeit the deposit and resell the car. It appears, however, that defendant had disposed of and delivered the Packard car to another about 6 or 7 weeks after May 3, as testified to by the salesman.

From a review of the evidence we are not able to say that the court was not justified in its finding and judgment. It tends to show that defendant did not fulfill its contract by tendering a new, unused car, such as the agreement manifestly called for. If it was not such a car plaintiff was not obliged to accept it and had the right to cancel the contract and demand back the value of the Dodge

since cargo usage of such kind, and that it lacked like a reasonable hand car. The three grounds he took refuge in answer the one. Defendant's witnesses vigorously who claimed to have seen pictures at the time and testified that they did not have substantial knowledge of the trade. To his complaint about the [illegible] it appeared to have been direct, "[illegible]" [illegible] [illegible] it was unknowingly to bring in data from the history to [illegible] charge. Further, that, in the main [illegible] proof how the [illegible] the dealer in [illegible]. [illegible] undertook to prove that it had not been [illegible] of what the [illegible] had not resolved the merge plaintiff claims. In fact, there was no proof that it was new or had merely been [illegible] and "unnecessary" it was when purchasing it from the [illegible].

Then 20 plaintiff wrote defendant [illegible] the amount for failure to deliver the car after the lapse of nearly [illegible] from the date of the contract, [illegible] the value of the large car, which had been previously displayed or [illegible] [illegible] 20, [illegible] that the [illegible] ready for delivery for the past [illegible] plaintiff called at once and [illegible] it would [illegible] the contract. [illegible] the deposit and recall the car. It appears, however, that [illegible] disposed of and delivered the [illegible] car to another about 7 weeks after May 3, [illegible] to [illegible].

From a review of the evidence [illegible] to say that the court was not justified in the finding and judgment. [illegible] to show that defendant did not [illegible] the contract by [illegible] new, unused car, such as the [illegible] sufficiently [illegible]. If it was not such a car plaintiff was not obliged to accept it and had the right to accept the contract and demand back the value of the [illegible]

car which defendant had disposed of.

But it is urged that there was no proof that the Dodge car was of the value of $650. At the beginning of the trial the parties agreed to most of the facts, and among them that the Dodge car was turned in for $650, and defendant's counsel then said, "that was the agreed value." From the record it would appear that the case was tried upon the theory that the only matters in dispute were, which party was in default and whether the car defendant sought to deliver was a new car as was intended. Defendant did not deny in its pleading that the Dodge car was of the value of $650, but simply that it did not owe that sum. Its value, therefore, was admitted by its pleading, if there be any doubt about the intention of the parties to agree as to its value.

It is argued that because the court remarked that the car was not delivered in a reasonable time the judgment was entered on an issue not made by the pleadings. It is immaterial what were the court's remarks if the finding and judgment on the issues made by the pleadings are justified by the evidence.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

33018

JOSEPH MATHY,
Appellee,

v.

LOUIS PFAU et al.,
Defendants.

ROVNOST HOMESTEAD
ASSOCIATION, a corp.,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

252 I.A. 643

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant, Joseph Mathy, filed, in the Superior Court of Cook County, his bill to foreclose a certain trust deed, and made Louis Pfau, Sophia Pfau, Frank B. Bussin, individually and as trustee, Stephen Grzebielski, Rose Grzebielski, his wife, and Rovnost Homestead Association, a corporation, defendants. Bussin did not file an appearance or an answer, and was defaulted. After answers filed by the other defendants the cause was referred to a master in chancery, who filed a report finding the equities with the complainant and recommending a decree in his favor. The chancellor sustained the report and entered a decree in accordance therewith. The Rovnost Homestead Association is the only defendant that has appealed.

The amended bill alleges that on March 10, 1920, the defendants Louis Pfau and Sophia Pfau, then owners of the premises in question, executed and delivered a trust deed conveying the premises to the defendant Frank B. Bussin, as trustee, in consideration of the sum of $1,000; that on the same date the Pfaus executed and delivered a note for $1,000, payable five years after date,

to the order of themselves and by them indorsed, etc.; that before maturity and for a valuable consideration, the complainant purchased the note and is now the holder and owner of the same; that on October 19, 1923, the Pfaus conveyed the premises to the Grzebielskis by warranty deed, which was recorded; that the defendant Frank B. Buszin, trustee, in violation of his duties as said trustee and in fraud of complainant, executed and delivered a certain release deed releasing the premises from the lien of the said trust deed; that said release was given without any consideration and without payment of the said note; that said release was recorded on November 9, 1924; that the sum of $1,000, together with interest from March 10, 1924, has not been paid to the complainant, or any part thereof. The bill prays for a foreclosure of the trust deed and that the purported release be set aside as a cloud upon the title of the complainant.

The answer of the Homestead Association avers that it is a corporation organized under "An Act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such associations," in force July 1, 1879, and amendments thereto, and is now doing business under "An Act in relation to mutual building, loan and homestead associations," in force July 1, 1919; that on September 11, 1923, the defendants Stephen Grzebielski and Rose Grzebielski became members of the Association and borrowed from it the sum of $2,500, and that to secure the loan they executed and delivered to the Association their agreement of the same date, wherein they promised to repay the loan in weekly payments of $6.25, with interest at six per cent per annum, payable monthly; that to further secure the payment of the loan the Grzebielskis executed and delivered to the Association a mortgage conveying the premises in question to it; that on October 5, 1923,

to the order of shareholders and by them indorsed, and, that after maturity and for a valuable consideration, the contract purchased the note and is now the owner and holder of the same; that on October 19, 1923, the firm accepted the payment to the negotiable or warranty deed, which was recorded; that the defendant Frank E. Martin, knowing, in violation of his duties as trustee and in fraud of complainant, therefor and entered a certain release deed releasing the premises from the lien of the said trust deed; that said release was given without any consideration and without payment of the said notes; that said release was recorded on November 2, 1923; that the sum of $1,000, together with interest from March 19, 1924, has not been paid to the complainant, or any part thereof. The bill prays for a reconveyance of the trust deed and that the purported release be set aside as a cloud upon the title of the complainant.

The answer of the Commercial Investment states that it is a corporation organized under "an act to enable associations of persons to become a body corporate to take titles to be vested only among the members of such associations," in force July 1, 1872, and amendments thereto, and is now doing business under "an act in relation to mutual building, loan and homestead associations," in force July 1, 1917; that on September 11, 1923, the defendants Stephen Grzeskiewicz and Rose Grzeskiewicz became members of the association and borrowed from it the sum of $1,000, and that to secure the loan they executed and delivered to the association their agreement of the same date, wherein they promised to repay the loan in monthly payments of $10.00, with interest at six per cent per annum, payable monthly; that to further secure the payment of the loan they negotiable executed and delivered to the association a mortgage conveying the premises in question to it; that on October 1, 1924,

the Association issued its check for $2,500 to the Grzebielskis in payment of the loan; that on October 9, 1923, $1,038.35 of said loan was paid to Frank B. Buszin, trustee, in full payment and satisfaction of the principal note for $1,000 executed March 10, 1920, by the Pfaus, and an interest note for $30 due September 10, 1924; that Buszin, at the time of the payment, represented that he was the owner of the principal note and that the same was temporarily mislaid, but that he would produce same as soon as found; that neither the Grzebielskis nor the Homestead Association had any notice prior to the payment of $1,038.35 that the complainant was the owner of the note; that the said payment was made in good faith upon "the circumstance that he was the Trustee named in said Trust Deed, and upon the further fact that said Buszin was in possession of the cancelled interest notes aforesaid and of the fire insurance policy on the improvements of said real estate and of the abstract of title;" that on November 5, 1923, the said Buszin, as trustee, "executed and delivered to said Association a joint Release Deed of said Trust Deed and of a certain Trust Deed from Henry Pansegran and Albertina Pansegran, dated March 22, 1915, to secure a principal note for $1,000, which theretofore had not been released;" that the defendants, the Grzebielskis and the Homestead Association, "having no notice that any other person was the owner and holder of said principal and interest notes now claimed by the complainant, and having paid the same, had the right to demand and accept from said Frank B. Buszin, as Trustee, the said Release Deed."

The facts in the case are clear: In 1922 the complainant purchased from the defendant Buszin, a broker, the note of the Pfaus for $1,000. At the same time he received an abstract of title and certain insurance policies. The notes were payable at the office

the investigation issued its report [illegible] on the maintenance in payment of the Hawk, Shaw on January 9, 1[illegible] of [illegible] was paid to Frank B. Dunlap, trustee, in full payment for [illegible] of the principal note for $1,[illegible] executed March 1[illegible], by the firm, and an interest note for $[illegible] due September 1[illegible]. Dunlap, at the time of the payment, informed [illegible] of the principal note and that he was [illegible] sit that he could produce [illegible] Crosbielaw made no [illegible] the payment of $1,[illegible] note; that the note payments were made in good faith [illegible] correspondence that in [illegible] the further fact that [illegible] was in possession of the [illegible] interest notes [illegible] improvements of [illegible] on November 3, 1[illegible], the [illegible] lived to [illegible] and of a month's [illegible] Pennsylvania, [illegible] $1,000, which [illegible] sums, the Crosbielaw [illegible] notice that any other [illegible] principal and interest [illegible] having paid the [illegible] Frank B. Dunlap. [illegible]

The firm in the [illegible] purchased from the [illegible] for $1,[illegible] certain [illegible]. The [illegible] payments at the [illegible]

of Buszin, or such other place as the holder might appoint in writing. It was the practice of the complainant to present to Buszin the interest coupons about the time they became due and to receive payment of the same through Buszin. In August, 1923, the Pfaus entered into an agreement to sell the premises in question to the Grzebielskis, and on September 11, 1923, they conveyed them to the latter, by warranty deed. While the deed is silent as to the incumbrance of $1,000, nevertheless, it is plain that it was the understanding that the conveyance was made subject to it. One A. B. Tabola, a real estate broker, represented the Grzebielskis in the transaction. Tabola was also a collector for the Homestead Association. In order to consummate the deal it was necessary for the Grzebielskis to raise money, and Tabola had them become members of the Association and they borrowed from it $2,500 with which to pay the principal and interest then due on the $1,000 note, and also to pay a certain amount that was due the Pfaus on the deal. At a directors' meeting of the Homestead Association, its check for $2,500, payable to the Grzebielskis, was handed to Tabola. The record does not show that the Grzebielskis were present at that meeting. Tabola had the Grzebielskis indorse the check and he deposited the same in his bank account. That evening, Tabola, alone, went to the office of Buszin with his personal check for $1,036, made payable to "Frank B. Buszin." The latter told Tabola that he could not give him "the papers at that time, because of the fact that he didn't keep the mortgages at his place, that he had them in the safe deposit box in the People's Stock Yards State Bank, and that he could not get into the box in the evening." To this statement Tabola answered: "I told him that I would leave the check and call for the papers next day; for which he gave me a receipt, stating everything was paid up, including the release fee and the interest to date." Tabola then

handed the check to Buszin. The receipt read: "Received of A. B. Tabola $1,038.35 to take up the Pfau mortgage, Document number 6759390, also taking up the Fanseegrau mortgage of $1,000." Tabola did not receive the promised papers the next day and he went to Buszin's office and the latter told him that he was unable to get them as he was too busy to get down to the deposit box. Four or five days later Tabola went to Buszin's office and the following occurred: "When I came in, and I rang the bell, he was in the office of his home, and he greeted me, and asked me to come into his office, and he told me that he finally got the papers and that they are all ready for me, and he told me to sit down and I did, and he went and sat down in his chair, and he said, here is the release deed, and as he did that I said, I want the canceled papers also, the notes and trust deed, and he said, there they are, and made a motion as though he was going to take them in his hand, and then he says, they are not here, I wonder what happened to them, I had them all ready for you; and when he said that he started to look around and he had quite a number of different papers or documents on his table or desk, and finally he says, after looking through all of his files, and on the table among the papers he had there, even looked into his book case and the files, and he says, by golly they are not here, they have disappeared, and he called Mrs. Buszin, his wife, and asked her if she saw them, and she said, yes, I saw those papers; he says, they were here, what could have become of them? and she says, I cleaned the waste baskets this morning, probably I threw them in there, she says, - probably one, - I might express myself, - he says, one thing that will save us, if we go down in the basement, probably she didn't throw them in the furnace or boiler; and we went down there and I saw the papers scattered around the furnace there, - some papers she threw in there that morning, and he says, she must have thrown them in the

furnace and they were burned. I told him that inasmuch as the papers were burned the only thing to do would be to give the building and loan or me a bond indemnifying us against loss. He said he would give us a personal bond any time we wanted it, that he was sure the papers were destroyed; and I told him that I didn't think the attorney for the building and loan association would accept a personal bond, but I told him that I thought it would be all right if he would give us a surety company bond, and he told me that he would immediately put in an application for such a bond. * * * He made an appointment with me to get this bond, but never did so." Buszin, however, gave Tabola a release deed releasing the trust deed in question and Tabola delivered this deed and the receipt given him by Buszin to the Homestead Association.

The Homestead Association contends "that the decree should be reversed and the bill dismissed for want of equity, or, at any rate, that the Hovnost Homestead Association mortgage should be declared a superior lien to the Mathy trust deed."

No other conclusion can be reasonably reached from the evidence than that the Association made Tabola its agent in the matter of the payment of the Pfau note. The Association, from the nature of its business, was familiar with transactions relating to real estate, and it is not probable that its directors gave $2,500 of the money of the Association to one who was not its agent, and relied upon him to take care of the interests of the Association in such an important matter. Tabola was its collector. He caused the Grzebielskis to become members of the Association. The mortgage to the Association covered only the Pfau property. The check of the Association was handed to Tabola at a meeting of the directors of the Association and he had the Grzebielskis indorse it, and

failure and they were burned. I told him that inasmuch as the papers were burned and well, there is no reason why he should be living the miserable life he is living, and that he should be a good law-abiding and law respecting citizen, and that he should give us a general release from any liability that he was now the papers were destroyed, and I told him that I didn't think the attorney for the building and loan association would accept a personal bond, but I told him that I thought it would be all right if he would give us a money order, and he said he would do that he would immediately put in an application for such a bond. * * * He made an agreement with me to get this done, but never did so." Therefore, there should be a release from relationship the bond deal in question and Tonola delivered this over and the receipt given him by Tonola to the Greenbelt Association.

The Greenbelt Association contends "that the records should be reversed and the bill dismissed for want of equity, or, at any rate, that the Herman Greenbelt Association mortgage should be declared a superior lien to the Bailey trust deed."

No other conclusion can be reasonably reached from the evidence than that the association made Tonola its agent in the matter of the payment of the Ffau note. The Association, from the nature of its business, was familiar with transactions relating to real estate, and it is not probable that the directors gave 99.90% of the money of the Association to one in no not its agent, and relied upon him to take care of the interests of the Association in such an important matter. Tonola was its attorney. He caused the Greenbelteers to become members of the Association. The mortgage to the Association covered only the Ffau property. The shares of the Association was handed to Tonola at a meeting of the directors of the Association and he had the Greenbelteers endorse it, and

thereafter the latter apparently took no part in the transaction. When trouble arose with Buszin, Tabola demanded that Buszin give the Homestead Association a surety bond to indemnify it against loss, and he stated to Buszin that the attorney for the Association would not accept a personal bond. Tabola turned over to the Association the receipt and the release deed that he received from Buszin and also a letter from the latter offering to accept payment of the note in question. Tabola showed plainly that he was trying to protect the interests of the Association, only. A careful study of the evidence offered by the Association fails to disclose any effort to prove that Tabola was not acting as an agent of the Association in the payment of the money. Tabola, called by the Association, was not even interrogated on that subject.

At the time Tabola paid Buszin the money the note was not due for about two years, and the master and the chancellor found that the conduct of Tabola in his dealings with Buszin amounted to gross carelessness, and in our judgment the evidence would warrant no other reasonable conclusion. Even if it were possible, under the facts, to hold that the Association did not make Tabola its agent in the matter of the payment, it certainly trusted him, and him alone, to protect its interest, and under no principle of law or equity can his negligence be used to the benefit of the Association and the injury of the innocent complainant. In its brief, the Association, in effect, admits the agency of Tabola and his negligence, when it states; "Here we have a case where this association has been imposed upon by an unscrupulous trustee." If a loss must fall on one of two innocent parties by reason of the fraud of another, it must fall on him who put it in the power of the wrongdoer to commit the fraud. (Connor v. Wahl, 330 Ill. 136.)

thereafter the letter apparently took no part in the transaction. Then Tobola dealt with Kuelz. Tobola consented that Kuelz give the Homestead Association a mortgage made by [illegible] to Andrew Loan, and he stated to Kuelz that the mortgage for the [illegible] would not accept a personal note. Tobola would give to the Association the receipt and the mortgage from [illegible] Kuelz and also a letter from the latter advising of such payment of the note in question. Tobola stated plainly that he was trying to protect the interests of the Association only. A careful study of the evidence offered by the Association fails to disclose any effort to prove that Tobola was not acting as an agent of the Association in the payment of the money. [illegible], called by the Association, was not even interrogated on that subject.

At the time Tobola paid Kuelz the money the note was not due for about two years, and the makers and the Association found that the conduct of Tobola in his dealings with Kuelz amounted to gross carelessness, and in our judgment the evidence would warrant no other reasonable conclusion. Even if it were possible, under the facts, to hold that the Association did not make Kuelz its agent in the matter of the payment, it certainly trusted him, and him alone, to protect its interests, and under the principles of law or equity and its negligence [illegible] in the interest of the association and the injury of the innocent complainants. In its brief, the association, in effect, admits the honesty of Tobola and his negligence, when it states: "Here we have a case where this association has been imposed upon by an unscrupulous trustee." If a loss must fall on one of two innocent parties by reason of the fraud of another, it must fall on him who put it in the power of the wrongdoer to commit the fraud. (*Hamer v. Hall*, 250 Ill. 156.)

In its reply brief the Association argues that "when Tabola paid Buszin, he was acting for the Pfaus, in order to carry into effect their warranty." In support of this position the Association cites the fact that the deed from Pfau and his wife to the Grzebielskis conveyed the premises subject only to "all taxes lawfully levied subsequent to the year 1922," and that "when Tabola paid Buszin, he was acting for the Pfaus, in order to carry into effect their warranty." This position is neither warranted by the answer of the Association nor by the facts in the case. The answer of the Association is based upon the theory that the Grzebielskis and the Association paid the note in question and were entitled, therefore, to demand and receive from Buszin the release deed executed by him. Tabola testified that in the matter of the sale of the property by the Pfaus to the Grzebielskis he represented the Grzebielskis, not the Pfaus. It is undisputed in the evidence that the Grzebielskis and Tabola understood that the property was bought subject to the trust deed in question, and the Grzebielskis, through Tabola, became members of the Homestead Association and borrowed the $2,500 from it to pay the $1,000 note and with the balance pay the Pfaus what was due them under the agreement. The mortgage given by the Grzebielskis to the Association covered only the property sold by the Pfaus to the Grzebielskis. The Homestead Association had nothing to do with the Pfaus. But even if Tabola were the agent of the Pfaus, we fail to see how his negligence can be charged to the complainant. The Association also argues that under the facts and circumstances Tabola was warranted in assuming that Buszin was the owner of the note in question. We cannot agree with this contention. The Association calls attention to the fact that the principal and interest notes were payable "at the office of Frank B. Buszin, in Chicago, Illinois, or in such other place as

In the early stage of the prosecution appears that Tomas Tabora gave Bunsen, in his notes, for the Crown, an account to every line effect that, [illegible] or less conflicting the prosecution alleg the fact that the [illegible] from the [illegible] the Government convicted the prisoner under [illegible] "[illegible] Insert - Lindley subsequent to the year 1907." and [illegible] Tomas [illegible] plot Bunsen, he was acting for the Crown, in effect in every [illegible] their effect. This position is entirely supported by the answer of the learned [illegible] for the Crown in the case. The answer of the [illegible] is based upon the theory that the [illegible] and the [illegible] part the more in [illegible] and [illegible] utilities. Therefore, in [illegible] and [illegible] from [illegible] the [illegible] accounted by him. [illegible] [illegible] that it is not [illegible] at [illegible] only of the property by the Crown is the [illegible] be [illegible] the transferability, not the Crown. It is unnecessary in the evidence that the [illegible] and Tomas [illegible] that the property was bought subject to the terms done in question, and the [illegible] through failure. [illegible] summary of the [illegible] [illegible] and borrows the [illegible] from it to pay the [illegible] [illegible] with the balance by the Crown [illegible] the [illegible] the [illegible]. The mortgage given by the [illegible] to the [illegible] the property sold by the Crown to the transferability. The [illegible] [illegible] not [illegible] to do with the [illegible]. But [illegible] if [illegible] very the [illegible] of the Crown, or fail in [illegible] [illegible] be charged to the [illegible]. The [illegible] [illegible] under the [illegible] and [illegible] [illegible] [illegible] that [illegible] [illegible] the [illegible] of the [illegible] in question. [illegible] [illegible] with this [illegible]. The [illegible] [illegible] in the [illegible] that the principal and [illegible] [illegible] were payable [illegible] or from [illegible], in [illegible], [illegible], or in such other place as

the legal holder hereof may from time to time in writing appoint." It is a common practice for real estate brokers to have inserted in like notes a provision that they are payable at the office of the agent. Authority to receive payment of a note or of the interest thereon is not authority to receive payment of such note before it is due (Wilderman v. Villiger, 233 Ill. App. 614, 619), and especially is this so where the party claiming the authority to receive payment fails to produce the note. "It is practically the universal custom to take up and cancel notes when they are paid, and for one who is authorized to collect, to have possession of the notes and be able to surrender them. Adams did not have possession of these notes, and we think it has uniformly been considered, under like circumstances, that there is no appearance of authority to make the collection. Where an agent has possession of a note that is due, it may be inferred that he has authority to receive payment of it, but such an authority could not be inferred from that fact in a case like this, where the paper was not due. Where a trustee releases a trust deed and receives payment of the debt without actual authority and without producing the securities, the party paying has notice of the want of power in the trustee. (Cooley v. Willard, 34 Ill. 68; Stiger v. Bent, 111 id. 328.) The inference of authority to receive payment arising from the possession of the securities is founded upon such possession, and it does not exist without possession. 1 Am. & Eng. Ency. of Law, (2d ed.) 1026." (Fortune v. Stockton, 182 Ill. 454, 461-2.) "In the absence of actual authority, an agency to receive payment upon a note or security can be implied only where the one assuming such authority has possession of the instrument, and capacity to deliver the same upon payment, and this rule is particularly applicable where the debt is not yet due." (2 C. J. 624.)

The Association cites also, in support of its present contention, that the Pfaus testified that they paid Buszin, at his office, all of the coupon notes between March 10, 1920, and September 11, 1923, and that he would mail them the coupons later. No authority in Buszin to collect the principal debt secured can be inferred merely from the fact that payments of interest on the note had been made to him before. (Stiger v. Bent, supra, 111 Ill. 328, 338.) The fact that an agent has express authority to collect interest on a note is not sufficient to show authority in the agent to collect the principal (Griffin v. Halbert, 196 Ill. App. 601, 604), and especially should this rule prevail in a case like the present one, where the principal note was not produced by Buszin and it was not due for about two years. (See also Walsh v. Peterson, 59 Nebr. 645, 650, and cases cited therein; Smith v. Kidd, 68 N. Y. 130; Wynn v. Grant, 166 N. C. 39, 48.) Moreover, the Pfaus testified that they did not receive the coupons at the time they made the payments, and that they would be mailed to them later. The Association also cites in support of its present contention certain statements of Buszin that it claims tend to support its contention that Buszin was the owner of the notes in question. These representations of Buszin as to his ownership can have no force against the complainant in the absence of acts of holding out by the complainant. As to the claim that Buszin had possession of the abstract: It is undisputed in the record that when Tabola, some time before the payment in question, went to Buszin to obtain the abstract, the latter wrote to the complainant requesting the loan of it for a short time and that Buszin thereafter received it from the complainant. Tabola testified that he was compelled to wait fourteen to eighteen days for the abstract.

We have carefully considered all the facts and circum-

stances in this case and we are unable to agree with the contention of the Homestead Association that Buszin was the owner of the note in question, and we do not think that the evidence shows that the complainant, in any way, held out Buszin as the owner of the note. It appears from the record that Buszin had been in the real estate business in the neighborhood in question for many years, and up to the time of the instant transaction he seems to have had a good standing, and Tabola, also a real estate agent, was apparently deceived by statements made to him by Buszin, and upon which he relied.

The Association argues that "a careful reading of Mathy's testimony must throw a suspicion and doubt in the court's mind, whether he was really a bona fide purchaser of these Pfau papers, or whether he was not a confederate of Buszin's." The master found that the complainant bought the note and trust deed in 1922 and was the legal owner of the same at the time of the hearing. The chancellor has sustained that finding. We approve of the action of the master and the chancellor in that regard. Buszin, by his default, admitted that the complainant was the owner of the note and trust deed and that his act in executing and delivering the release deed was in violation of his trust and a fraud upon the complainant. It is hard to believe that if he could have made any defense to the serious charges made against him he would have permitted himself to be defaulted. The Association did not see fit to call him although the record shows that he was in Chicago at the time of the hearing.

The decree of the Superior Court of Cook County is a just one and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

absence in this case which we are minded to agree with the majority of the Commissioners mentioning that Dublin was the owner of the area in question, and we do not doubt that the evidence show a legal tenancy, in any way, both as to the amount of the rent, it appears from the return that Dublin had been in the legal possession in the subdivided portion for many years, and by the time of the instant transaction he (?) was in fact and a good standing, and labour, also a well paying tenant, and generally described by witnesses who is (?) by Dublin, and that (?) valid.

The contention argues that the general feeling of Dublin's testimony will serve a complaint and court in the county seat, whether he was really a bona fide purchaser of land for the property, or whether he was not a confederate of Dublin's. The witness (?) that the complainant bought the area and (?) land in 1924 and was the legal owner of the same at the time of the hearing. The commissioner had matching that finding. In spurts of the opinion of the master and the commissioner in this respect. Dublin, by his defendant, admitted that the complainant was the owner of the main and street door and that his was in possession and cultivating the various land was in violation of his trust and a fraud upon the complainant. It is hard to believe that if he could have made any claims as the actions of the more against him he would have possibly claimed to be defendant. The conversation did not see fit to call him although the record shows that he was in Dublin at the time of the meeting.

The decree of the chancery court of such county is a just one and it is affirmed.

AFFIRMED.

Gaddy, P. J., and Bryant, J., concur.

33070

TELLER CORPORATION,
a corporation,
Appellee,

v.

L. J. LEON MANUFACTURING
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago, confirming a judgment by confession on a written lease, entered December 31, 1925, in the sum of $437.16.

This case was heretofore in this court on an appeal from an order of the Municipal Court denying a motion of the appellant to vacate and open up the judgment. The first division of this court on February 7, 1927, reversed and remanded the case (No. 31195) on the ground that the affidavit supporting the said motion made out a prima facie defense. Subsequently, there was a trial by the court on the merits and a finding that there was due the plaintiff (appellee) from the defendant (appellant) $437.16, and the judgment entered December 31, 1925, was confirmed. This appeal followed.

The appellant, L. J. Leon Manufacturing Company, a corporation was engaged in the manufacture of bird cages and stands. Sometime prior to the said confession of judgment, the appellant rented a certain space (No. 1410) in the American Furniture Mart Building from the Mart Building Corporation, in which it exhibited its wares. The appellee, Teller Corporation, leased considerable space in the said building and sublet the same to others. On

50370

Philip Construction Co.,
a corporation,
Appellee,

v.

L. A. Jones Construction
Company, a corporation,
Appellant.

Appeal from Superior Court
of Cook County.

No. 37371 Judgment affirmed.

Mr. JUSTICE SCHWARTZ delivered the opinion of the court.

This is an appeal from a judgment of the municipal court of Chicago, confirming a judgment by default in a mechanics lien, entered November 21, 1960, in the sum of $[illegible].

This suit was instituted in this court on an appeal from an order of the municipal court sustaining a motion of the appellant to vacate and open up the judgment. The first division of this court on January 1, 1961, reversed the judgment (Op. 51157) on the ground that the motion to vacate was filed within the 30 days allowed by the statute. Accordingly, there was a trial by the court on the merits on [illegible], when there was due the plaintiff (appellee) from the defendant (appellant) $[illegible], and the judgment entered [illegible] 1, 1961, was affirmed. This appeal followed.

The appellant, L. A. Jones Construction Company, a corporation was engaged in the manufacture of [illegible] and cabinets, furnished plans to the [illegible] corporation of Jacksonville, the appellee, [illegible] a certain house (Op. 51157) in the Beverly Hills [illegible] building from the Philip Construction Corporation, in and to it [illegible] its terms. The appellee, Philip Construction, issued [illegible] space in the main building and [illegible] the base to cabinets. On

December 6, 1924, the appellee made a lease to the appellant of a certain space in the Mart Building for a term of five (5) years at an annual rental of $800, payable in semi-annual instalments of $400 each. This lease was signed, so far as the appellant is concerned, "L. J. Leon Manufacturing Company by L. J. Leon, president."

The appellant concedes that L. J. Leon was its president, but it contends that he was not authorized to execute the lease in question. In Quigley v. Macqueen & Co., 321 Ill. 124, the court said:

> "The general rule is that the president of a corporation, as agent and representative, has power, in the ordinary course of business, to execute contracts and bind the company in so doing. He is by by virtue of his office recognized as the business head of the company, and any contract pertaining to corporate affairs within the general powers of such corporation, executed by the president on behalf of the corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation."

The appellant introduced in evidence a by-law that the president "shall execute all contracts and agreements authorized by the Board of Directors" and another one that the secretary "shall sign with the president or a vice-president, in the name of the corporation, when authorized by the board of directors so to do, all contracts and instruments requiring the seal of the corporation and may affix the seal thereto," and appellant, as we understand its argument, contends that such proof rebutted and overcame the prima facie case of appellee as to the authority of Leon to sign the lease. Whether the appellee, dealing with the appellant in good faith and on the faith of Leon's apparent powers and without notice of the by-laws of the appellant, can be bound by the by-laws of the appellant, (see Atwater v. American Exchange Bank, 152 Ill. 605, 620; Fred K. Higbie Co. v. Chas. Weeghman Co., 126 Ill. App. 97, 100) is a question not necessary to decide in the view that we

December 6, 1963, the appellee made a loan to the appellant of certain space in the Bank Building for a term of five (5) years at an annual rental of $80, payable in semi-annual installments of $40 each. This lease was signed, by and on the appellant's behalf, "M. T. Lane President" and by the appellee, "L. A. Lane, President."

The appellant contends that L. A. Lane was the president, but it contends that he was not authorized to execute the lease in question. In Wright v. Bankers Life Co., 51 Ill. App. 2d 1, the court said:

> "The general rule is that the president of a corporation, as agent and representative, has power, in the ordinary course of business, to execute contracts and bind the company in so doing, only by virtue of his office conferred on him by the board of the company, and any contract particularly by corporate officers within the general powers of such corporation, executed by the president on behalf of the corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation."

The appellant introduced in evidence a by-law that the president "shall execute all contracts and instruments authorized by the Board of Directors" and another that the secretary "shall sign with the president or a vice-president, in the name of the corporation, then authorized by the board of directors to do so, all contracts and instruments requiring the seal of the corporation and any other and legal instruments, and shall perform such other duties as usually appertain to the secretary's office, or as may be assigned to him by the board of directors." The appellant argues that the lease was not signed by the president or by the secretary, and that the appellee was on notice that the lease was not signed by the president or secretary because the lease was signed by the secretary and the president was not the secretary. Neither the appellant, dealing with the corporation in good faith and on the faith of Lane's apparent power and without notice of the by-laws of the corporation, can be bound by the by-laws of the corporation. (see Lincoln v. Western Exchange Bank, 158 Ill. 487, 490; Fred E. Ridgie Co. v. Chas. Thielman Co., 142 Ill. App. 97, 100) is a question not necessary to decide in the view that we

The evidence shows that the appellant moved into the space leased it by the appellee and occupied it from December, 1924, to about September 1, 1925. Samples of its wares were there exhibited. Two public exhibitions were given in the Mart during that period, one in January and one in July. The appellant paid by its checks the two semi-annual instalments of rent that fell due under the lease in December and June; each check was in the amount of $400, and was signed not only by Leon, as president, but by Zimmerman, as treasurer. Leon and Zimmerman were both directors in the appellant corporation. On December 13, 1924, the appellee wrote the appellant a letter requesting a check for $400 on account of the semi-annual rent and also asking a letter from the appellant in reference to certain advertising in a furniture journal. This letter also contained the following:

> "If you desire a three-coat paint job on the floor - olive green - the building will do this for $22.05. It is possible that you prefer to use a rug."

This communication was answered on behalf of the appellant by "W. F. Zimmerman, vice-president." The answer states that it "will in turn remit for the rental" when the appellee sends the blank authorization for the appellant to sign.

It is clear from the evidence that the appellant had no thought of claiming that the execution of the lease was not authorized until the American Furniture Mart Building Corporation notified it on July 1, 1925, that it had violated the terms of its lease with that corporation by having two exhibits in the Mart and requested the appellant to remove its samples from "space 1410" and to return its lease to the Mart Corporation for cancellation. From a letter written by the Furniture Mart Corporation to appellant on July 11, 1925, it is apparent that the appellant wrote to the Mart

The evidence shows that the appellant moved into the space leased to it by the appellee and occupied it from December, 1924, to about September 1, 1929. Receipts of the rental were there- exhibited. Two [illegible] solicitations were given in the year during that period, one in January and one in July. The appellant paid by the checks the ten semi-annual instalments of rent that fell due under the lease in November and [illegible] which checks, in the margin of [illegible], one was signed [illegible] by Lewis, as president, and by Ackerman, as treasurer. Lewis and Ackerman were both officers in the appellant corporation. On December 11, 1924, the appellee wrote the appellant a letter requesting a check for $[illegible] in advance of the semi-annual rent and also [illegible] a letter from the appellant in reference to certain advertising in a furniture journal. This letter also contained the following:

> "If you desire a first-class paint job on the floor - white paint - the building will be able for [illegible]. It is possible that you wanted it was a rug."

This communication was answered on behalf of the appellant by Mr. J. Ackerman, vice-president. The answer states that it "will be very good for the rental" [illegible] the appellee sends the blank authorization for the appellant to sign.

It is clear from the evidence that the appellant had no thought of claiming that the execution of the lease was not authorized until the American Furniture Mart Building Corporation notified it on July 1, 1929, that it had exercised the option in its lease with that corporation by having [illegible] to the [illegible] and re- quested the appellant to vacate the premises from "Space 1430" and to return its lease to the Mart Corporation for cancellation. From a letter written by the Furniture Mart Corporation to appellant on July 11, 1929, it is apparent that the appellant spoke to the Mart

Corporation, after the receipt of the letter of July 1, asserting that permission had been given to it to exhibit in two spaces. After the Mart Corporation had insisted that appellant could not have two spaces in the Mart, the appellant wrote to the appellee under date of July 30, 1925, as follows:

> "Having found out that it is against the rules of the Furniture Mart Building to display in two different spaces in the building, we have decided to give up the space we are leasing from you, and will move our samples within the next few days. We will ask you, therefore, to be kind enough to try to sublease the space for us as of December 1st. Of course we expect to be reimbursed for the money paid out for partitions, posts and design structure.
>
> "Since we have not been informed by your corporation that it is against the rules of the building to have two spaces, we expect you will make all efforts to sublease the space for us, and will ask you to be kind enough to inform us if you are willing to do so."

The appellant also wrote the Mart Corporation asking if it would be satisfactory to that corporation for the appellant to make arrangements with the appellee in reference to the space in question and that corporation answered that it would be satisfactory to it for the appellant

> "to make whatever arrangements you wish with the Teller Corporation that they may be agreeable to. * * However, this does not in any way release you from any liability to the Teller Corporation."

The changed attitude of the appellant, when it discovered that the Mart Corporation would not allow it to have two spaces in the Mart, is thus evidenced by the testimony of Mr. Leon:

> "Q. What did you do when Mr. Wilson informed you you could not have the two spaces?
>
> A. I decided to keep the old space No. 1410 and give up the Teller Corporation lease.
>
> * * * *
>
> Q. After you received letter, you simply chose to keep space 1410 and give up Teller space?
>
> A. Yes, space 1410 was more valuable."

Corporation, after the merger of the latter on July 1, meaning that permission had been given to it to operate as two spaces. After the Mart Corporation sue Insurance was granted right for more two spaces in the Mart, the operations ceased in the separate under date of July 1, 1970, as follows:

> "During round out what is to be spaces you [illegible] of the [illegible] Mart building to employ in two different spaces in the building, we have [illegible] up the space we are leaving from you, and will move our business within the Mart for space. We will pay you, therefore, to be also [illegible] for [illegible] leave the space for us of [illegible] lease. [illegible] we expect to be reimbursed for the money paid [illegible] partitions, [illegible] and [illegible] expenses.
>
> "Since we have our own [illegible], [illegible] that it is against the rules of the building to [illegible] spaces, we request you will [illegible] [illegible] the space for us, and will ask you to be [illegible] to inform us if you are willing to do so."

The appellant also [illegible] the Mart Corporation claims it would be satisfactory to [illegible] arrangement for the operations to make arrangements with the appellee in reference to the space in question and that corporation concerns that it would be satisfactory to it for the appellant.

> "To make [illegible] arrangements, [illegible] with the Fuller Corporation [illegible] may be [illegible] to, [illegible] over, this does not in any way release you from any liability to the Fuller Corporation."

The occupied existing of the [illegible], then it [illegible] that the Mart Corporation would not allow it to have two spaces in the Mart. is thus evidenced by the testimony of Mr. Lonn:

> "Q. What did you do when Mr. Tilson informed you you could not have the two spaces?
>
> A. I decided to keep the old space by Mr. Lilo and give up the Fuller Corporation lease.
>
> * * *
>
> Q. After you received letter, you simply [illegible] keep space [illegible] and give up Fuller lease?
>
> A. Yes, space [illegible] was more valuable."

It is perfectly apparent from the evidence that the appellant had the lease in question in its possession and that it took and held possession of the premises under it and paid rent under the lease for a period of eight months. Therefore, even though Leon had not the power to make the lease sued on, under the by-laws of the appellant corporation, nevertheless, under the facts and circumstances of this case the appellant made the lease its own act and was bound by it. (See Fred N. Higbie Co. v. Chas. Weeghman Co., supra, and cases cited therein.) Even if the lease was unauthorized at the time it was executed the subsequent conduct of the appellant ratified and confirmed it. (Elevator S. & R. Co. v. Biddle-Murray Mfg. Co., 156 Ill. App. 461; Lake St. El. R. R. Co. v. Carmichael, 184 Ill. 548, 552; Miller Brewing Co. v. Heileman Brewing Co., 198 Ill. App. 178.)

We are satisfied after a careful examination of the evidence in this case that the present claim of the appellant that it did not ratify the action of its president in executing the lease in question is an afterthought and a mere pretense, without any substantial basis in the evidence and interposed for the sole purpose of evading its just debt.

The judgment of the Municipal Court should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

33088

JIM DI ROSA,
Appellee,

vs.

ISOM SMITH,
Appellant.

APPEAL FROM SUPERIOR COURT
COOK COUNTY.

25 I.A. 613

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County in an action on the case, Jim Di Rosa, plaintiff, sued Isom Smith, defendant. There was a trial before the Court, with a jury, and a verdict returned finding the defendant guilty and assessing the plaintiff's damages in the sum of $4500.00. Judgment was entered on the verdict, and this appeal followed.

The record is unusually free of errors commonly assigned in a case of this kind. The sole contentions of the defendant are: First, that there is no evidence in the record "tending to show that appellee was in the exercise of due care and caution for his own safety." Second, "the evidence discloses that appellee was guilty of negligence that contributed to the bringing about of the injury of which he complains." Third, "the evidence fails to show that the appellant was driving his car at a high and dangerous rate of speed, to-wit, 50 or 70 miles per hour, and this conclusion is borne out by the physical facts." Fourth, "The finding of the jury, under special interrogatories, in favor of the appellant, not only eliminates the elements of wilfulness and wantonness, but reduces the whole contention to one of ordinary negligence."

The following facts are undisputed: The plaintiff on September 4, 1926, in company with his son and Jim Angarana, were traveling in the plaintiff's automobile, in an easterly direction on the Dunes Highway in Porter County, Indiana. The

highway was 18 to 20 feet wide and there was sand on each side of it. About 6:30 o'clock a. m. the plaintiff, on account of a leak in the car, drove it partially off the paved portion of the highway, so that the two right wheels of the car were from two to six feet off the said paved portion, and then stopped the car. After working on the car for about twenty-five minutes, it was then found that the two wheels on the right side of the car had become so embedded in the sand that the plaintiff was unable to start his car. He had just sent his son and Angarone to a farm house for help, and was standing close to the front of his car, on the left-hand side of it, with one foot on the running board or fender, when the defendant's automobile, proceeding in an easterly direction, struck the plaintiff and caused the injuries for which he sued. The plaintiff's car was in view of the defendant for a distance of about four city blocks.

The plaintiff also introduced evidence to sustain the following theory of fact: That the defendant, as he approached and reached the place in question, was driving at a rate of speed between 50 and 70 miles per hour; that just before the accident the defendant passed cars that were being driven between 50 and 55 miles per hour; that as the defendant got close to the plaintiff's car, he attempted to pass another automobile that was also proceeding eastward, and which was traveling at a high rate of speed; that just then cars approached from the east and the defendant suddenly turned or swerved his car to the right and struck the plaintiff; that it was a clear morning and it had not been raining.

The defendant introduced evidence to sustain the following theory of fact: That as he approached the place where the plaintiff's car was standing he, "was going just a little more than about thirty miles" per hour; that he, "saw Mr. Di Rosa's car parked partly on the pavement;" that the defendant saw his "way

bigamy was in to do for one side and there was no end (see or it. Upon this evidence, a, the plaintiff, we [illegible] in the car, there is certainly not any [illegible] way, so that the two other [illegible] of the defendants [illegible] that of the main power station, and [illegible] working on the car for about twenty-five minutes, if the jury [illegible] that the [illegible] in the [illegible] of the [illegible] backed in the [illegible] the plaintiff [illegible] in [illegible]. He had just [illegible] and [illegible] the [illegible], and was standing alone in the front [illegible] side of it, when one [illegible] of the [illegible] [illegible], that the defendant's [illegible], [illegible] the plaintiff was [illegible] the [illegible]. The [illegible] tiff's car was in view of the [illegible] [illegible] of [illegible] city street.

The principal [illegible] [illegible] to establish the following theory of fact: That the [illegible], in [illegible] and leaving the place in question, was driving at a rate of speed between 25 and 30 miles per hour; that just before the accident the defendant [illegible] that [illegible] between 25 and 30 miles per hour; that in the [illegible] of the plaintiff's car, he [illegible] to [illegible] [illegible] [illegible] proceeding backward, and while was travelling at a high rate of speed; that just when [illegible] the [illegible] and the defendant [illegible] [illegible] the plaintiff; that it was a [illegible] and it did not [illegible] [illegible].

The defendant introduced evidence to establish the following theory of fact: That as he approached the place where the plaintiff's car was standing he, "saw going just a little bit [illegible] slowly along" per car; that he, "saw no car [illegible] parallel to the pavement;" that the defendant saw the "car [illegible]

clear to go by;" that just as he reached about the rear end of the plaintiff's car, "on the left-hand of me was another car east-bound trying to pass me, so I threw on my brakes and skidded, and pinned him between the two fenders;" that it had rained that night and the pavement was pretty slippery; that "the car that got in front of me was on the left-hand side of me on the driveway going west * * * the one going east was pretty close up to us. This car had gone around me on the left-hand side of the pavement. Had I not stopped I would have run into him. As soon as I saw the car I put on my brakes immediately, and about that time the crash happened;" that the plaintiff was standing at the front end of his car, looking east with one foot on the fender; that the defendant noticed the plaintiff's car when he was about a block west of it; and that he then checked the speed of his car; that the defendant blew his horn when he was still "far enough away from Mr. Di Rosa to turn the car without hitting him."

The jury by their verdict have found in favor of the plaintiff's theory of fact, and after a careful examination of the evidence, we approve of that finding.

As to the first contention of the defendant:

> "The question of contributory negligence is usually a question for the jury. It only becomes one of law for this court when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. (Beidler v. Branshaw, 200 Ill. 425.) Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the question of contributory negligence is for the jury. (Illinois Central Railroad Co. v. Anderson, 184 Ill. 294; 1 Thornton on Negligence, 100.)" (Mueller v. Phelps, 252 Ill. 630, 634.)

> "'There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstance.' (Stack v. East St. Louis Ry. Co., 245 Ill. 308.)" (Pienta v. Chicago City Ry. Co., 284 Ill. 246,252.)

After a careful examination of the record, we are satisfied that it was a question of fact to be submitted to the jury whether the plaintiff was exercising ordinary care at the time of and just prior to the accident. The jury by their verdict have found that he was in the exercise of ordinary care, and under the facts and the law we do not think that we would be justified in disturbing that finding. What we have said as to defendant's first contention, of course, also applies to his second contention. As bearing on the first and second contentions, we note that the defendant made no motion of any kind at the close of the plaintiff's evidence or at the close of all the evidence. It is clear that at the time of the trial the counsel for the defendant proceeded on the theory that the plaintiff made out a prima facie case. As to his third contention, we assume that the defendant by it means to assert that at the time of and just prior to the accident, he was not guilty of negligence. In our judgment the finding of the jury that the defendant was guilty of negligence is amply warranted by the proof in the case. The fourth contention of the defendant requires no special consideration.

The record shows that the defendant has had a fair and impartial hearing. The judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

After a careful consideration of the record, we are satisfied that it was a question of fact for the determination of the jury whether the plaintiff was exercising ordinary care at the time of and just prior to the accident. The fact is that a prudent person found that he was in the exercise of ordinary care, and under the facts and the law we do not think that we could properly be disturbing that finding. That we may make no misunderstanding concerning our contention, of course, also resting in this second consideration, we are bearing on the rules and second contentions, we state that the defendant made no motion of any kind at the close of the plaintiff's evidence or at the close of all the evidence. It is clear that at the time of the trial the counsel for the defendant proceeded on the theory that the plaintiff made out a prima facie case. In this third contention, we cannot even see how it determined by it means or exercised just at the time of and just prior to the accident, in the nature of negligence. In our judgment the finding of the jury that the defendant was guilty of negligence is amply supported by the proof in the case. The trial court correctly of the defendant requires no special consideration.

The record shows that the defendant has had a fair and impartial hearing. The judgment of the Superior Court of Cook County should be and it is affirmed.

O.

Gridley, P. J., and Brady, J., concur.

33100

LU-MI-NUS SIGNS, Inc.,
Appellee,

v.

WESTERN PREMIUM CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 644

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, Lu-Mi-Nus Signs, Inc., a corporation, plaintiff, obtained a judgment by confession against Western Premium Co., a corporation, defendant, of $425.09, upon a judgment promissory note executed by the defendant, and made payable to the plaintiff. After judgment the defendant moved the court "that the judgment rendered herein by confession be vacated and set aside" and introduced in support of the motion an affidavit of Albert Siegel, president of the defendant corporation. The motion of the defendant was denied and this appeal followed.

The plaintiff contends, and with much force, that if the defendant had made a motion for leave to plead, the judgment to stand as security, nevertheless, the affidavit was insufficient to warrant the trial court in opening up the judgment, but in the view that we have taken of this appeal it will not be necessary to determine this contention, for even if the affidavit had made out a prima facie defense to the action of the plaintiff, as there was no jurisdictional question involved in the defendant's motion, the only thing that the defendant would have a right to ask in

33100

IN-KI-ADO [illegible], Inc.,
[illegible]

v.

[illegible]
a corporation,
Respondent.

Mr. [illegible] delivered the opinion of the Court.

In the Municipal Court of Chicago, [illegible] Inc., a corporation, plaintiff, obtained a judgment of [illegible] against Tadeusz [illegible], a corporation, [illegible] of $418.00, upon a judgment nonsuit [illegible] by the defendant, but [illegible] in the plaintiff. After judgment the defendant moved the court that the judgment rendered herein by nonsuit be vacated and set aside and [illegible] in support of the motion an affidavit of [illegible] [illegible], presented to the defendant [illegible]. The motion of the defendant was denied and duly excepted [illegible].

The plaintiff contends, and it is [illegible], that if the defendant had made a motion for [illegible] in [illegible], the judgment is [illegible] to nullity, nonexistence, the [illegible] [illegible] to [illegible] the trial court in [illegible] to the judgment, and in the view that it is have taken of this appeal it [illegible] necessary to determine this contention. For even if an [illegible] [illegible] and a prima facie defense to the action of the plaintiff, or there was no jurisdictional question involved in the [illegible] [illegible], the only claim that the defendant would have a right to ask is

such a case would be for leave to plead, while the judgment stood as security. It did not ask any such relief, but sought to have the trial court deprive the plaintiff of its judgment on a mere motion, supported by an affidavit. The defendant's motion that the judgment be vacated and set aside was therefore properly denied. (See Dewitt v. Flint & Walling Mfg. Co., 132 Ill. App. 356, 358.)

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

33128

164

A

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN L. BLUMER,
Appellee,

v.

G. F. WALDVOGEL, commissioner of buildings of the Town of Cicero, JAMES J. PELIKAN, town clerk of the Town of Cicero, and TOWN OF CICERO, a municipal corporation,
Respondents.

G. F. WALDVOGEL, commissioner of buildings of the Town of Cicero,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

252 I.A. 644

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was a petition for mandamus, on the relation of John L. Blumer, against G. F. Waldvogel, commissioner of buildings of the town of Cicero, James J. Pelikan, town clerk of the town of Cicero, and Town of Cicero, a municipal corporation. The petitioner dismissed as to Pelikan and Town of Cicero. The cause was tried by the court, without a jury, and the court found for the petitioner and entered an order for a peremptory writ of mandamus against the respondent, Waldvogel, commanding him that he forthwith issue to the petitioner a permit for the construction, erection and maintenance of the building or structure described in the petition. This appeal followed. The petitioner has not filed an appearance or a brief in this court.

The petition alleges that the petitioner is the lessee of certain premises in the town of Cicero, and that he intends to use the premises for the purpose of erecting a restaurant thereon; that he had purchased a structure, commonly known as a dining car,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN L. BLUMER,

Appellee,

v.

G. T. VALDVOGEL, commissioner of buildings of the Town of Cicero, JAMES J. POLLIKA, town clerk of the Town of Cicero, and TOWN OF CICERO, a municipal corporation,

Respondents.

G. T. VALDVOGEL, commissioner of buildings of the Town of Cicero,

Appellant.

MR. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT:

This was a petition for mandamus, on the relation of John L. Blumer, against G. T. Valdvogel, commissioner of buildings of the town of Cicero, James J. Pollika, town clerk of the town of Cicero, and Town of Cicero, a municipal corporation. The petitioner dismissed as to Pollika and Town of Cicero. The cause was tried by the court, without a jury, and the court found for the petitioner and entered an order for a peremptory writ of mandamus against the respondent, Valdvogel, commanding him that he forthwith issue to the petitioner a permit for the construction, erection and maintenance of the building or structure described in the petition. This appeal followed. The petitioner has not filed an appearance or a brief in this court.

The petition alleges that the petitioner is the lessee of certain premises in the town of Cicero, and that he intends to use the premises for the purpose of erecting a restaurant thereon; that he had purchased a structure, commonly known as a mining car,

and that the same was then in a railroad freight yard; that he desires to erect and maintain the said car as a building upon the premises; that he has made application to the respondent, Waldvogel, for a permit to erect the car as a building upon the premises and that he has submitted plans and drawings that comply fully with the terms and provisions of the ordinances of the said town; that it was the duty of the said respondent, under the ordinances of said town, to issue a building permit to the petitioner; but that the respondent Waldvogel arbitrarily, and without reason, refuses to issue the same; and the petitioner prays that Waldvogel be commanded to issue to him a permit for the construction, erection and maintenance of the said building.

The respondent answered, inter alia, that the premises in question were a part of the property of the Chicago Rapid Transit Co., and used by it as its right of way through the said town, and that the said property, under the terms and provisions of the ordinances of the town of Cicero, is not permitted to be used for commercial or business purposes and the respondent denied that the plans and drawings submitted by the petitioner were in conformance with the ordinances of the said town; and further denied that his action in refusing to issue to the petitioner a permit to construct the proposed building on the premises in question was arbitrary, and without reason or cause.

The respondent contends that the trial court erred in denying him the right to have the issues submitted to a jury. This contention is a meritorious one. The answer of the respondent denied facts alleged in the petition upon which the claim of the relator was founded and it appears that when the cause was reached for trial the respondent moved that the issues be submitted to a

and that the case was taken in a reckless fashion by people who be
cause to crash and smash in the door on a suspicion upon the
premises; that he had made application to the Department, therefore,
for a permit to erect the sign as a substitute upon the premises and
that he has remodelled rooms and dwellings when repairs only were
the terms and provisions of the statutes of the said town; that
it was the duty of the said respondent, after the commencement of
said town, to issue a building permit to the petitioner; but that
the respondent disregarded arbitrarily, and without reason, refused
to issue the permit and the petitioner then was compelled by com-
mended to issue to him a permit for the construction, erection and
maintenance of the said building.

The respondent answered, inter alia, that the premises
in question were a part of the property of the Chicago Legal Aid
Co., and used by it as its right of way through the rail road, and
that the said property, under the terms and provisions of the
ordinances of the town of Cicero, is not permitted to be used for
commercial or business purposes and the respondent claims that the
plans and drawings submitted by the petitioner were in contravention
with the ordinances of the said town; and further claims that his
action in refusing to issue to the petitioner a permit to construct
the proposed building on the premises in question was arbitrary,
and without reason or cause.

The respondent contends that the trial court erred in compel-
ing him the right to have the issued mandatory in - jury. This
contention is a meritorious one. The answer of the respondent
denied facts alleged in the petition upon which the claim of the
petitioner was founded and it appears that when the answer and pleadings
for trial the respondent moved that the issues be submitted to a

jury, and that the court denied this motion, on the ground that the respondent was not entitled to a jury trial in a proceeding like the present one. This ruling was an erroneous one. The proceeding was an action at law, and the respondent had the right to have the issues of fact tried by a jury. (See Puterbaugh Common Law Pleading & Practice, 10th ed., p. 732; People v. Czaszewicz, 295 Ill. 11; Wilke v. City of Chicago, 212 Ill. App. 414, 416.) Section 5 of the Mandamus Act clearly contemplates that a party to such a proceeding has a right to have the issues of fact submitted to a jury.

The respondent further contends that the petitioner failed to prove that he had complied with the building ordinances of the town of Cicero, and, after an examination of the evidence, we find that this contention is also meritorious.

The judgment of the Superior Court of Cook County is reversed, and the cause is remanded with directions to the trial court to allow the respondent a trial by jury.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

33140

JOSEPH JOHNSON,
Appellee,

vs.

ELGIN, JOLIET AND EASTERN
RAILWAY COMPANY, a Corporation,
Appellant.

APPEAL FROM CITY COURT
OF CHICAGO HEIGHTS,
COOK COUNTY.

165

A

252 I.A. 644

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the City Court of Chicago Heights, Cook County, Illinois, Joseph Johnson, plaintiff, sued the Elgin, Joliet and Eastern Railway Company, a corporation, defendant, in an action on the case. The case was tried before the court with a jury and there was a verdict finding the defendant guilty and fixing the plaintiff's damages at the sum of $36,25[illegible]. A motion for a new trial was overruled, judgment was entered on the verdict and this appeal followed.

The declaration consisted of seven counts. The theory of the first six counts is a liability under the Federal Employers' Liability Act, and of the seventh count a liability for an alleged violation of the Federal Boiler Inspection Act. The first count alleges that the defendant negligently operated a switch engine; the second, that the defendant failed to warn the plaintiff by bell, signal, whistle or other means of the presence or approach of the engine; the third, that the defendant negligently operated an engine without keeping or maintaining a reasonably safe or careful lookout in the direction toward which the engine was being driven; the fourth, that the defendant violated a custom to ring a bell or sound a whistle as the engine in question approached the place where the plaintiff was crossing; the fifth, that the defendant violated a printed rule of the Company and operated a tender in the night time without having any light thereon as provided by said rule; the sixth, that the

defendant failed to observe an established practice and custom of bringing all its engines to a full stop before passing a certain signal or stop-light near the point where the plaintiff was crossing the tracks at the time of the accident; the seventh, that at the time of the accident the head light on the rear of the tender which struck the plaintiff was out of repair, unlighted and defective. The defendant filed a plea of the general issue. At the close of all the evidence the trial court, on motion of the defendant, instructed the jury to find the defendant not guilty as to the sixth and seventh counts.

At the time of the accident the plaintiff had been in the railroad service for about twenty-eight years. For eight years he had worked for the defendant, first as a fireman and afterwards as an engineer. On the night in question, he operated his engine from Buffington, Indiana (where he had been switching cars in interstate transportation during the afternoon), to "Kirk Yard," at Gary, Indiana, and brought the engine to a stop on track six, about fifty or sixty feet west of a cinder pit. At that point the plaintiff left his engine and walked in a southeasterly direction for the purpose of going to the roundhouse several hundred feet away, where he intended to turn in his report. There were three tracks entering the pit from the west. Number six was the most northerly one; number four the center one, and number three the southerly one. In the pit employees of the defendant cleaned the engines of cinders. The plaintiff crossed track number four and was about to cross track number three when he was struck by the tank of one of defendant's switch engines and received injuries which necessitated the amputation of his left leg at the ankle and his right leg above the knee. It was stipulated on the trial that the plaintiff's employment brought him within the provisions of the Federal Employers' Liability Act and there-

defaulted failing to observe an obligation imposed on persons of
bringing all its engines to a full stop before reaching a crossing
signal or stop-light near the point where the pavement ends
log the tracks of the line at the crossing; the engineer, who at
the time of the accident was leaning out of his cab, was
within sixteen feet of the crossing, attempted the
tive. The defendants filed a plea of contributory negligence.
close of all the evidence the trial court, on motion of the
f'endant, instructed the jury to find for the defendant on
to the sixth and seventh counts.

At the time of the accident the plaintiff was employed
in the railroad service for about twenty-seven years. The first
years he had worked for the defendant, then as a fireman and
afterwards as an engineer. On the night in question, he driving
his engine from Bulington, Indiana to had been engaged
one in inter-state transportation during the afternoon, in "
ford," at Gary, Indiana, and proceeding to Bulington
ole, about fifty or sixty feet ahead of a street car. As that
ular was slowly in the course he noticed to a considerable
direction for the purpose of going to the roundhouse situated
nundred feet away, which he intended to use in his return. There
were three tracks adjacent the main track. Twelve cars was
the most recently coupled number that the engine had, and twelve
there the contrary one. In the cab accompanied at the
cleaned the engine of cinders. The plaintiff testified that
number four was the about to cross the tracks when he saw
struck by the car it was at immediately before the
saved injuries which necessitated the amputation of his left leg
at the knee and his right leg above the knee. It was stipulated
on the trial that the plaintiff's employment brought the
the provisions of the federal Employers' Liability Act of

fore the plaintiff's right to recover is not barred by contributory negligence on his part.

The defendant has assigned and argued a number of contentions, but in the view that we have taken of this appeal it is only necessary for us to consider one. The defendant contends that "even though it should be held that a motion for a directed verdict should not have been granted, the overwhelming weight of the evidence and the necessary conclusions which must be drawn therefrom are such that the verdict is contrary to * * * the evidence and the motion for a new trial should have been granted." In this case, in addition to elaborate briefs, we have been favored with oral arguments. After a very careful study and consideration of the entire evidence, we have reached the conclusion that the verdict, on the issue of the alleged negligence of the defendant, is clearly and manifestly against the weight of the evidence and that the trial court erred in denying the motion for a new trial. As this case may be tried again, we refrain from analyzing and commenting on the evidence.

We find no merit in the contention of the defendant that the trial court erred in refusing to give to the jury defendant's instructions numbered three to six, inclusive.

The plaintiff has assigned cross-error based upon the action of the trial court in directing a verdict for the defendant upon the seventh count of the declaration. This count charged a violation of the Federal Boiler Inspection Act. The plaintiff contends that certain evidence introduced in his behalf made out a prima facie case under count seven and that therefore the trial court erred in instructing the jury to find the defendant not guilty under that count. Because of the fact that we have held that the verdict is manifestly against the weight of the evidence, it is not necessary for us to pass upon this contention. We note,

fore the plaintiff's right to recover is not barred by contributory negligence on his part.

The defendant has assigned not merely a number of contentions, but a long list that we have found to be, with minor exceptions, only tangentially or by implication so. The principal contention that "even though it may be said that the [illegible] verdict should not have been directed, the preponderating weight of the evidence and the reasonably conclusions drawn from the [illegible] therefrom are such that the verdict is contrary to [illegible] evidence and the weight [illegible] verdict." In this case, in addition to [illegible], we have [illegible] with good reasoning. After a very careful [illegible] of the entire evidence, he has reached the conclusion that the verdict, on the issue of the alleged negligence of the defendant, is clearly and manifestly against the weight of the evidence and that the trial court erred in denying the motion for a new trial. As this case may be tried again, we refrain from discussion and comment on the evidence.

We find no error in the instruction to the jury. [illegible] that the trial court erred in refusing to give the defendant's requested instructions numbered [illegible] to [illegible].

The remaining two complaints [illegible] the motion of the trial court in [illegible] the jury [illegible] upon the ground that it had [illegible] and [illegible] charged a violation of the United States Constitution. The plaintiff contends that neither question [illegible] in the lower court but a [illegible] were both [illegible] the jury [illegible] the trial court erred in [illegible] the jury [illegible] [illegible] [illegible]. However, it has long been a [illegible] that the verdict is manifestly against the weight of the evidence, it is not necessary for us to pass upon this [illegible]. By [illegible]

however, that the plaintiff, in support of his contention, cites the following evidence: The plaintiff testified (in chief) that right after the accident he said to Bell, the engineer of the switch engine that struck him: "Why didn't you have your headlight lit?", to which Bell replied: "I had the switch on, that socket was out." This admission cannot be used, in chief, as proof of the alleged defect, although it might become competent on rebuttal by way of impeachment of the witness Bell.

The judgment of the City Court of Chicago Heights is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

however, have the plaintiff, in spite of his contention, given the following evidence. The plaintiff testified in court that right after the accident he made an exit, but another driver said engine that stopped. "My car's the best you've ever seen," to which that replied. "I had the radio on, and heard the [illegible] This substantial change in color, if true, is proof of the change defect, although it might become significant only [illegible] impossibility of the strong [illegible].

The judgment of the trial court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Grubley, P. J., and Kerner, J., concur.

33146

CHARLEY A. KUFAHL,
Appellee,
v.
EDWARD O. SPURLIN and
HALLIE SPURLIN,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 644

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of forcible detainer, Charley A. Kufahl, plaintiff, obtained a judgment against Edward O. Spurlin and Hallie Spurlin, defendants. The defendants' motion to vacate the judgment was overruled. From this order the defendants have appealed. The appeal is based upon the common law record.

Counsel for the defendants has seen fit to state in his brief that the trial court denied the defendants a change of venue and refused to sign a bill of exceptions tendered by the defendants. He has also stated that one Meyers made a claim that ran counter to that of the plaintiff. As this appeal is based on the common law record, such statements are unwarranted and highly improper and we would be justified, under the circumstances, in striking the brief of the defendants.

The defendants contend that the judgment is void for the following reasons: The summons and the complaint are against Edward O. Spurlin and Hallie Spurlin and the judgment order names Edward O. Spurlin and Hattie Spurlin as the defendants, and the defendants contend that "Hallie" and "Hattie" are distinct and separate names and that the doctrine of idem sonans does not

[illegible]

CHARLEY [illegible],
[illegible],

v.

EDWARD C. [illegible] and
BILLIE [illegible],
Appellants.

[illegible] FROM [illegible]
[illegible] OF [illegible].

[illegible]

MR. JUSTICE CHARLEY delivered the opinion of the court:

In the Municipal Court of Chicago, in an action of forcible detainer, Charley v. Smith, plaintiff, obtained a judgment against Edward C. Smith and Billie Smith, defendants. The defendants' motion to vacate the judgment was overruled. From this order the defendants have appealed. The appeal is based upon the common law record.

Counsel for the defendants has seen fit to state in his brief that the trial court denied the defendants a change of venue and refused to allow a bill of exceptions tendered by the defendants. He has also stated that one Rogers made a claim that was counter to that of the plaintiff. As this appeal is based on the common law record, such statements are unnecessary and highly improper and we could so identify, under the circumstances, in striking the brief of the defendants.

The defendants contend that the judgment is void for the following reasons: The summons and the complaint are against Edward C. Smith and Billie Smith and the judgment order names Edward C. Smith and Billie Smith as the defendants, and the defendants contend that "Billie" and "Billie" are distinct and separate names and that the doctrine of idem sonans does not

apply and that the judgment (being joint and not several) is void.

The difference in the first name of one of the defendants amounts to nothing more than a variance and such a question cannot be raised for the first time in a court of review. (See the many cases cited on this point in Puterbaugh's Common Law Pleading and Practice, 10th ed., p. 46.) Variance must be specially pointed out on the trial. (See O'Brien v. Chicago City Ry. Co., 220 Ill. App. 107, 111.) For aught that appears in this record, "Hattie" may be the correct first name of the defendant in question, and it has been frequently stated by our Supreme Court that a very broad and liberal construction of the Amendment Act should be given in furtherance of the intention of the Legislature and it has been repeatedly held that in a case like the present one a plaintiff, any time before judgment, has a right to make changes in the names of the parties to the suit. Had the defendants seen fit to point out the variance on the trial, doubtless the plaintiff would have made the necessary amendments. The Municipal Court had jurisdiction of the parties and the subject matter, and the judgment in question is not void.

The record shows that the jury returned the following verdict:

"1603213.....No.

CHARLEY A. KUFAHL v. EDWARD O. SPURLIN AND HATTIE SPURLIN	Forcible Entry and Detainer. Finding for Plaintiff

We, the jury find the defendant . . . guilty of unlawfully withholding from the plaintiff . . . the possession of the premises described in plaintiffs complaint herein and that the right to the possession of said premises is in the plaintiff . . ."

Here followed the names of the twelve jurors. The defendants contend that the verdict found only "the defendant" guilty, etc., and that this verdict was insufficient to sustain the judgment entered

apply and that the judgment (being dicta and not material) is right.

The difference in the first kind of case of the defendants seeking to bringing suit under a statutory cause of action, should be evident for the first time in a court of appeals. (See the many cases cited on this point in Restatement, Conflict of Laws and treatises, like Beale, p. 46.) Evidence such as specially relevant was on the trial. Jones v. Chicago [illegible] 1[illegible] Ill. 1[illegible], 1[illegible]. For such that appears in this record, "Illinois" was by the correct first name of the defendants in [illegible], and it was been frequently stated by our courts that a [illegible] Illinois constitution of the [illegible] in [illegible] ance of the jurisdiction of the [illegible] held that in a case like the present one a [illegible], by [illegible] judgment, has a right to make [illegible] to the [illegible] to the suit. But the [illegible] to be [illegible] on the trial. Considering the [illegible] [illegible] appropriate. The [illegible] the jurisdiction of the [illegible] and the [illegible] [illegible] the [illegible] [illegible].

The reason above that the jury returned the following verdicts:

"[illegible]
[illegible]
v.
[illegible]

We, the jury find the defendant . . . guilty of unlawfully withdrawing from the [illegible] . . . the possession of the premises described in [illegible] complaint herein and that the right to the possession of said premises is in the plaintiff . . ."

Here followed the names of the twelve jurors. The defendants contend that the verdict found only "the defendant guilty," and that that verdict was insufficient. In [illegible] the judgment [illegible]

and that the action of the court in entering judgment on such a verdict constituted reversible error. In Italian-Swiss Ag. Colony v. Pease, 194 Ill. 98, it was held that the authority rests in the court to put a verdict in form, where it is, on its face, good in substance and the authority does not depend upon the consent or knowledge of the jury, and the court quotes with approval from Wiggins v. City of Chicago, 68 Ill. 372, the following:

> "It has been repeatedly held by this court, that it is immaterial what the form of the verdict may be, so that it has the substance of a proper finding."

In Law v. Sanitary District, 197 Ill. 523, 526, it is said:

> "The judgment, entered by the court, as above set forth, may be regarded as an amendment of the verdict, or as a construction of the verdict. (Harvey v. Head, 68 Ga. 250.) A verdict may be amended by the court or construed by reference to the pleadings and the evidence in the record, and in some instances from the notes of the judge, when the intention of the jury is apparent from the pleadings and the evidence. Courts adhere strictly to the rule that 'when the intention of the jury is manifest, the court will set right matter of form.' (Harvey v. Head, supra; Hawkes v. Crofton, 2 Burrows, 698; Petrie v. Harney, 3 Penn. 659; Clark v. Lamb, 8 Pick. 415.) 'In considering the verdict itself, with a view to its sufficiency, the first object is to ascertain what the jury intended to find; and this is to be done by construing the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction, which are applicable to pleadings. If the meaning of the jury can be ascertained, "and a verdict on the point in issue can be made out, the court will mould it into form and make it serve." * *' (Miller v. Shackleford, 4 Dana, (Ky.) 271; Mays v. Lewis, 4 Tex. 38)."

(See also Matson v. Connelly, 24 Ill. 143; Hartford Fire Ins. Co. v. Vanduzor, 49 Ill. 489, 492; City of Pekin v. Winkel, 77 Ill. 56.)

We think the court was justified under the law in entering the judgment it did on the verdict, especially as there is nothing in this record to show that the defendants, prior to the entry of judgment, objected in any way to the form or substance of the verdict or to the entry of the judgment upon the verdict. No motion for a

and thus the action of the court in entering judgment on such a verdict constitutes reversible error. In [illegible] v. [illegible] v. Jones, 144 Ill. 89, it was held that the [illegible] erred in the court by put a verdict in form, [illegible] it was, or the form, and in substance and the substantial [illegible] or [illegible] or [illegible] of the jury, or the court [illegible] with [illegible] from [illegible] v. City of [illegible], 68 Ill. 307, the following:

> "It has been repeatedly held by this court, that it is immaterial what the form of the verdict may be, so that it be the unanimous of a proper finding."

In Lee v. [illegible], 147 Ill. App. 490, it is [illegible]

> "The judgment, entered by the court, in view of the fact, may be regarded as an [illegible] of the verdict, or as a construction of the verdict. (Kenny v. Ward, 68 Ill. 519.) A verdict may be amended by the court, or construed by reference to the pleadings and the evidence in the record, and in case inconsistent with the power of the judge, when the foreman of the jury is a witness from the pleadings and the evidence. Courts should strictly so the rule that 'when the intention of the jury is manifest, the court will not refer matter of form.' (Kenny v. Ward, supra; Hodges v. [illegible], 1 Ill. App. 1[illegible]; Pitts v. Lewis, 3 Ill. App. 1[illegible]; [illegible] v. [illegible], 1 Ill. App. 1[illegible]; [illegible] the verdict is in [illegible] form in the [illegible]; first object is to ascertain what the jury intended to find; and this is to be done by considering the verdict literally, with the fair view of ascertaining the meaning of the jury, and not under the controlled rules of construction, which are applicable to pleadings. If the meaning of the jury can be ascertained, and a verdict on the point in issue can be made out, the court will amend it into form and make it a [illegible]." (Miller v. Bowdlerd, 4 Dora. (Ky.) 8[illegible]; Lane v. Lane, 4 Tex. 7[illegible].)

(See also Watson v. Cornelly, 96 Ill. 557; Northern Ill. [illegible] v. Zimmerer, 49 Ill. 448, 452; City of [illegible] v. [illegible], 77 Ill. 56.)

In which the court was justified under the law in entering the judgment it did on the verdict, especially as there is nothing in this record to show that the [illegible], prior to the entry of judgment, objected in any way to the form or sufficiency of the verdict or the entry of the judgment upon the verdict. Mr [illegible] for a

new trial appears to have been made and the defendants did not see fit to interpose a motion in arrest of judgment.

Judgment was entered June 6, 1926. On June 11, 1926, the defendants made a motion to vacate the judgment and incorporated in it a motion for a new trial and in arrest of judgment. No affidavit was filed in support of the motion to vacate.

We find no merit in this appeal and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

33176

IRVING BUSCH,
Appellant,

vs.

PORTIS BROS. HAT COMPANY,
a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

252 I.A. 644

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against defendant to recover damages claimed to have been sustained by him by reason of the breach of a written contract. The court sustained a demurrer to plaintiff's second amended declaration. Plaintiff elected to stand by his second amended declaration; his suit was dismissed at his costs and he appeals.

There are four counts in the declaration; in each of them the written contract, the alleged breach of which is the basis of the suit, is set up verbatim. The contract is dated February 1, 1912, and by its terms plaintiff was employed to work as foreman in defendant's hat factory for a period of five years; his compensation was fixed at $75 a week and 12 cents a dozen on certain kinds of hats and 5 cents a dozen on other hats which might be manufactured at the defendant's factory while plaintiff was acting as its foreman. Paragraph 3 of the contract is as follows:

"3. In the event of a strike being called in the factory of the party of the first part (defendant) the party of the first part agrees to pay the compensation herein provided for to the party of the second part (plaintiff) throughout the term of said strike and a strike called by the Union or lock-out by first party shall not be considered as a breach of contract. In the event the party of the first part sells its aforesaid business or ceases doing business or retires from business during the period of this agreement, or in the event the party of the first part shall breach this contract by discharging the party of the second part before the

termination of this agreement, then the party of the first part agrees to pay to the party of the second part the sum of Thirty-five Hundred Dollars ($3500) as liquidated damages and not as a penalty."

In each count it was further alleged that plaintiff worked for defendant under the contract until October 1, 1923, when defendant violated the agreement by ceasing to manufacture hats in Chicago. In some of the counts it is alleged that the defendant ceased to manufacture hats in Chicago and moved its factory to Michigan City, Indiana, and that under the terms of the contract it was contemplated by the parties that plaintiff was to do his work at the factory in Chicago.

In each of the counts it was further alleged that defendant refused to compensate the plaintiff in accordance with the terms of the contract, by reason of which plaintiff was damaged to the amount of $9125 for "salary which he would have earned" during the remainder of the period covered by the contract and the further sum of $2500 for "bonuses earned and which would have been earned by plaintiff under the terms of the contract," and the total damages were laid at $11,625.

Plaintiff contends, as we understand his argument, that the damages specified in the written contract at $3500 in case of a breach of it by defendant, although stated in the contract to be liquidated damages and not as a penalty, are to be considered in the nature of a penalty, and furthermore, that he is not precluded from recovering his actual damage, which is much more than the $3500 - viz. $11,625. The law is well settled that it is competent for parties entering upon a contract to avoid all future questions as to the amount of damages which might result from violation of the contract, and to agree on a definite sum as that which shall be paid to the party who alleges and establishes a violation of the agreement; and in such case the damages so fixed are termed liquidated or stipulated damages. But even

> termination of this agreement, then the party of the first part agrees to pay to the party of the second part the sum of thirty-five thousand dollars ($35000) as liquidated damages and not as a penalty."

In each count it was further alleged that plaintiff worked for defendant under the agreement until January 1, 1924, when defendant violated the agreement by [illegible] in Chicago. In some of the counts it is alleged that the defendant ceased to manufacture [illegible] in Chicago and moved its factory to Michigan City, Indiana, and thus broke the terms of the contract it was contemplated by the parties that plaintiff was to do his work at the factory in Chicago.

In each of the counts it was further alleged that defendant refused to permit the plaintiff to [illegible] in accordance with the terms of the contract, by reason of which plaintiff was damaged to the amount of [illegible] for "salary which plaintiff would have earned" during the remainder of the period covered by the contract and the further sum of [illegible] for "commissions and which would have been earned by plaintiff under the terms of the contract," and the total damages were laid at [illegible].

Plaintiff contends, as we understand his argument, that the damages specified in the written contract ($35000) in case of a breach of it by defendant, although stated in the contract to be liquidated damages and not as a penalty, are to be considered in the nature of a penalty, and "accordingly, that he is not precluded from recovering his actual damages, which he says are more than the $35000 - viz: [illegible]. The law is well settled that it is competent for parties entering upon a contract to settle all future questions as to the amount of damages which might result from violation of the contract, and to agree on a definite sum as that which shall be paid to the party who alleges and establishes a violation of the agreement; and in such cases the damages so fixed are termed liquidated or stipulated damages; and even

where such a course has been adopted, difficulty has arisen as to whether the amount named in the contract should be considered as liquidated damages or as a penalty, and if the latter, of course the amount laid in the contract will not be enforced. If the contract may reasonably be construed so that the amount named has been agreed upon by the parties as the amount of damages in case of breach of the contract, then it will be enforced as made. The cardinal rule of construction is the meaning of the contract as written.

In the instant case the contract provides that if defendant sells its business, or ceases or retires from business during the period covered by the contract, or in the event that it should discharge plaintiff before that time, defendant should pay to plaintiff $3500 as his liquidated damages. We think this provision makes it clear that the parties intended that in case defendant should cease to manufacture hats, then it should pay to plaintiff $3500 and no more; and even if we should construe the allegations of the counts to mean that plaintiff ceased to do business within the meaning of the contract by removing its factory to Michigan City, it would avail plaintiff nothing, because he could not recover more than the $3500. We are therefore of the opinion that each count was demurrable. But we are further of the opinion that there is no provision of the contract that would require plaintiff to continue the operation of its factory in Chicago, and that it would not breach its contract by moving its plant a few miles from Chicago to Michigan City.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

33222

JAMES FOLEY and MARGARET FOLEY,
Appellees,

v.

ALTON MIKAL JUNAS and ALTON SPAITES,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 645

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse an order of the Municipal court of Chicago, denying their motion to vacate a judgment confessed on a lease for failure to pay rent.

The record discloses that on March 10, 1925, plaintiffs, as landlords, entered into a written lease with defendants as tenants demising the premises in question from March 15, 1925, until March 15, 1930, at a rental of $5400, payable in monthly instalments of $90 each. The premises demised are described as "The entire building together with garage and out-houses located on the premises commonly known as No. 1059 W. 47th Place, Chicago, Illinois. The store premises to be used for grocery and meat market business and the several flats for living purposes." The lease also provided that the landlords should "clean and decorate the first floor on or before May 1, 1925. The expenses to be borne by the said first parties. The parties of the first part also agree to replace any plate glass that may be broken during the term of this lease." The tenants entered into and occupied the premises until July 7, 1928, when they vacated. On February 21, 1928, plaintiffs caused a judgment by confession to be entered against the defendants for rent for fifteen days in August and for the months of September, October, November and December, 1927, and January and February, 1928. Included in the judgment was $65 for attorney's fees, the judgment being for $630.

On August 8, 1928, the defendants moved the court to vacate the judgment and for leave to defend. In support of the motion the affidavit of defendant Anton Mikelajunas was filed. It set up inter alia that defendants had no knowledge of the entry of the judgment until July 30, 1928; that by the terms of the lease plaintiffs agreed to "clean and decorate the first floor on or before the first of May, 1925. The expenses to be borne by said parties of the first part. The parties of the first part also agree to replace any plate glass which may be broken during the term of this lease." The affidavit further set up that the cleaning had not been done although defendants often requested plaintiffs to do so; that the walls were dirty and cracked; that on July 1, 1927, "two (2) large front plate glass windows, each being about eight (8) feet square, were broken out of the front of the said premises, by persons unknown to these defendants;" that defendants notified plaintiffs on that day and requested them to replace the glass; that thereafter up to and including July 6, 1927, they daily notified plaintiffs and requested them to replace the glass but that they refused to do so; that on account of the glass being broken and the failure of plaintiffs to replace it, the front of the store in which defendants conducted their business was exposed to the weather and a large amount of stock and food stuffs were spoiled, and in order to save the remainder of their stock they were forced to abandon and vacate the premises on July 7th. And further, the plaintiffs had included in the judgment confessed $65 for attorney's fees, while the lease specified the attorney's fees to be $25. The court denied the motion to vacate and the defendants appealed.

Plaintiffs contend that the affidavit in support of defendants' motion was deficient in the manner of its execution, in form and in substance; that the affidavit was sworn to before a notary public who was counsel for defendants and therefore it was

[illegible]

[illegible] counsel for [illegible]

"utterly void and worthless." We think this contention is not warranted. In Phillips v. Phillips, 185 Ill. 629, it was held that it was not proper practice for an attorney to administer an oath to his client in a suit in which he was employed, but that such verification was not a nullity.

A further point is made that the affidavit was insufficient because there was no venue stated in the beginning of the affidavit. We think this is a misapprehension. The venue at the beginning of the affidavit is in proper form, viz., "State of Illinois, County of Cook, Ss."

It is further contended that the affidavit is deficient in substance because it is "vague and evasive," and a number of technical points are urged against it, none of which we think substantial. While it might have been drawn with greater care, we think it is sufficient. It sets up in substance that the plate glass was broken on July 1, 1927; that defendants notified plaintiffs of that fact on the same date and that they notified them daily thereafter to and including July 5th.

Upon an examination of the briefs in the case, it seems to be conceded by plaintiffs that defendants would be warranted in vacating the premises unless the broken glass was replaced by plaintiffs within a reasonable time, but it is contended that the affidavit fails to disclose facts which tend to show that plaintiffs had a reasonable time within which to replace the glass. In support of this it is said that the court would take judicial notice that July 1, 1927, was Friday, that July 2 was Saturday, which is a half holiday in Chicago, that July 3 was Sunday, and Monday, July 4, was a holiday, and that therefore there were only two days - the 5th and 6th - within which plaintiffs might have replaced the glass; and it is contended that the failure to replace the glass on those two days would not warrant defendants

"utterly void and worthless." We think this contention is not warranted. In Phillips v. Phillips, 185 Ill. 629, it was held that it was not proper practice for an attorney to administer an oath to his client in a suit in which he was employed, but that such verification was not a nullity.

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It is further contended that the affidavit is insufficient in substance because it is "vague and evasive," and a number of technical points are urged against it, none of which we think substantial. While it might have been drawn with greater care, we think it is sufficient. It sets up by averment that the plate glass was broken on July 1, 1927; that defendants notified plaintiffs on that date of the same fact and that they notified them daily thereafter up to and including July 6th.

From an examination of the affidavit the theory, it seems to be intended by plaintiffs that defendants would be warranted in vacating the premises unless and until the glass was replaced by plaintiffs within a reasonable time; and it is contended that the affidavit fails to aver facts from which it would appear that plaintiffs had a reasonable time within which to replace the glass. In support of this it is said that the court would take judicial notice that July 1, 1927, was Friday, that July 2 was Saturday, which is a half holiday in Chicago, that July 3 was Sunday, and Monday, July 4, was a holiday, and that therefore there were only two days - the 5th and 6th - within which plaintiffs could have replaced the glass; and it is contended that the failure to replace the glass on these two days would not warrant defendants

in moving out of the premises. The affidavit shows that the glass was broken on July 1st and that plaintiffs were notified on that date. It further appears that defendants were conducting a store in the premises, as the lease provided. In these circumstances we think it was a question of fact whether the time that elapsed was unreasonable.

We think the judgment should have been opened up and leave given the defendants to present their case on the merits.

Something further is said by plaintiffs to the effect that even if the glass was not replaced, and if by reason of this fact defendants were authorized to vacate the store, this did not warrant defendants vacating the entire building. We had occasion to consider a similar question in Carlson v. Levinson, 228 Ill. App., 104, where we said the law had long been settled "that where a lessee has been wrongfully evicted by his landlord from a portion of the demised premises, he is thereby excused from the payment of any rent, although he continues to occupy the remaining portion of the premises to the end of the term. Hayner v. Smith, 63 Ill. 430; Lynch v. Baldwin, 69 Ill. 210; Walker v. Tucker, 70 Ill. 541; Leiferman v. Osten, 167 Ill. 93; 2 Wood on Landlord and Tenant, 1107."

We are unable to understand why the trial judge did not reduce the judgment $45 by reason of the fact that the lease provided that in case of confession of judgment, the plaintiffs might include $20 for attorney's fees while in the judgment $65 was included, in view of the fact that this fact was a specified allegation made in the affidavit. Counsel for plaintiffs, however, has filed a remittitur in this court of $45, but since the order of the Municipal court must be reversed for the reasons hereinbefore mentioned, this error may be obviated on a trial of the case.

in moving out of the premises. The evidence shows that the jewelry was broken on July 1st and that scratches were evident on that date. It further appears that defendants were occupying a store in the premises, as the lease recited. In these circumstances we think it was a matter of fact whether the loss that occurred was unreasonable.

In these cases the judgment should have been opened up and leave given the defendants to present their case on the merits.

Counsel for plaintiff is only in error in the effort that was if the place was not insured, due to the cause of this fact defendants were entitled to insure the risk. This is not warrant defendants evading the entire liability. We had occasion to consider a similar question in Cohen v. Lawson, 38 Ill. App., 104, where we said the law had long been settled "that where a lease has been wrongfully evicted by his landlord from a portion of the demised premises, he is thereby released from the payment of any rent, although he continues to occupy the remaining portion of the premises to the end of the term. Kepner v. Keys, 83 Ill. 226; Lynch v. Cairnie, 88 Ill. 240; Kepner v. Keys, 78 Ill. 482; Lefferson v. Cohen, 107 Ill. 67; Pope v. Lawrence and Tassel, 110."

In the matter of mitigation we have been unable to find that the judgment has by reason of the fact that the lease provides that in case of destruction of property, the plaintiff might insure and recover. The plaintiff's judgment was inclined, in view of the fact that this was not a wanton allegation made in the affidavit. Counsel for plaintiff, however, has filed a memorandum in this court of 243, and since the order of the municipal court must be reversed for the reasons herein before mentioned, this error may be avoided on a trial of the case.

The order of the Municipal court of Chicago is reversed and the matter remanded with directions to open up the judgment and give leave to the defendants to interpose a defense.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Matchett, JJ., concur.

33111

HENRY J. PASCHEN,
Appellee,

vs.

MATERIAL CARTAGE COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 645

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

The defendant seeks the reversal of a judgment, said to be for $563.98, entered after trial by the court in an action of trespass on the case. Defendant's abstract contains only the bill of exceptions and does not properly show us the nature of the action or plaintiff's claim nor the judgment of the court. Under the circumstances the reviewing court could properly affirm.

However, we have examined the record and find that the controversy arose out of the collision of two trucks, one owned and driven by plaintiff and the other owned by defendant and driven by C. A. Nelson.

Plaintiff testified that he was coming southeasterly on Elston avenue, in Chicago, with his empty truck, when he met the other truck, loaded, going in the opposite direction; that the pavement there is about 20 feet wide. Plaintiff says that he pulled his two left wheels off the curb when Nelson made a short swing which caused the rear wheels of defendant's truck to swerve, striking the left front wheel of plaintiff's truck and inflicting considerable damage.

Defendant's story is that he was on the right edge of the road and that plaintiff's truck was over the center line of the street and that it ran into the rear hub of defendant's truck.

The respective stories are in direct conflict and it was peculiarly for the trial court who saw the witnesses to

Grant C. Fisher,
Appellee.

vs.

Florence Lucille Fisher,
a corporation,
Appellant.

Mr. Justice Sullivan delivered the opinion of the court.

The defendant seeks the reversal of a judgment, said to be for $[illegible], entered upon trial by the court in an action of trespass on the case. Defendant's contract declaration only bill of exceptions has been not entirely some is the source of the action or plaintiff's cause nor the judgment of the court. Under the circumstances the evidence cannot be properly stated.

However, we have examined the record and find that the injuriously complained of by the defendant in the action, if any, [illegible] and taken by E. L. Allen.

Plaintiff testified that he was making [illegible] on Sixteen Street, in Chicago, with his wife, [illegible], when he met the other truck, loaded, going in the opposite direction and the personal injury is about to [illegible]. [illegible] that he walked all the way across the road, [illegible] when [illegible] right, [illegible] the [illegible] of defendant's truck, [illegible] the left front wheel of plaintiff's truck and [illegible] considerable damage.

Defendant's story is that it was a warm [illegible] and of the road was that plaintiff's truck was over the center line of the street and that it was [illegible] the [illegible] truck.

The testimony tending to show a proper condition and is was peculiarly for the trial court who saw the witnesses to

determine which was the true one.

Complaint is made of the rulings of the trial court on the evidence and of the reasons given for his conclusions. We may not agree with either the rulings or the reasons of the court, but if we cannot say that the conclusion was manifestly against the weight of the evidence, it must be affirmed. We do not feel justified in disturbing the findings of the court as to who caused the accident.

We are told that the amount of the judgment includes a repair bill of $323.98. There is no testimony offered controverting the question of damages or as to the reasonableness of the repair bill. Plaintiff testified that the damages mentioned in the bill were caused by the accident and that he paid the bill. This made out a prima facie case of the reasonableness of the cost of the repairs. Clyves v. Plastic, 231 Ill. App. 193; approved in Byalos v. Matheson, 325 Ill. 269.

We are advised that the judgment included a net profit of $240 claimed to have been lost by plaintiff through his inability to use the truck while it was being repaired. This is on the basis of a profit of $20 a day for 12 days. There is no evidence whatever that plaintiff made any attempt to hire another truck or to minimize the damages in any way, nor is there any evidence that he would have been constantly employed at this rate of profit during the time. The loss of profits was not sufficiently proven and should not have been allowed.

For the reasons indicated the judgment is reversed and judgment will be entered in this court for the amount paid for repairs, $323.98, against the defendant, costs in this court to be taxed against the defendant.

REVERSED AND JUDGMENT IN THIS COURT FOR $323.98.

O'Connor, P. J., and Matchett, J., concur.

33297

EFFIE POE,
Appellee,

v.

JOSEPH MARCINIAK,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

252 I.A. 645

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit under the Dram Shop Act, section 20, chapter 43, alleging that she was injured by reason of defendant's selling her husband intoxicating liquors. Upon trial by the court defendant was found guilty and judgment for $150 was entered against him, from which he appeals.

The first point made is that the children of the plaintiff are not made parties plaintiff, but, as no damages were awarded to the children and the suit was brought on behalf of the wife alone, they were not necessary parties.

The credibility of the plaintiff and her husband is questioned with special reference to their marriage, but it was proven by documentary evidence that plaintiff was married to Fritz Poe June 18, 1925.

The main point of attack is directed against the conduct of the judge upon the trial. Defendant's brief charges that the finding was due to "the impulsive remarks, oratorical efforts and lectures by Judge Joseph B. David on the Prohibition Law, laws of our sister states and other varied subjects." There are ample grounds for this criticism, as the record shows. We have elsewhere said of similar conduct on the part of a trial judge "though

it make the unskilful laugh, cannot but make the judicious grieve" and is usually costly to the litigants and to the public. The Roy Iverson Co. v. U. S. Lloyd's, Inc., 246 Ill. App. 628. However, if the judgment is proper in a case tried without a jury, we should affirm regardless of the ebullient fulminations of the trial judge.

Emerging from the farrago of talk appears the story of the plaintiff to the effect that she was living with her husband in Harvey, Cook County, Illinois, where he was employed as an automobile mechanic, receiving an average wage of $50 a week, and was also a special police officer on the Harvey police force; that sometime prior to May, 1927, her husband began the excessive use of intoxicating liquor; that he purchased this liquor from the defendant who conducted a grocery store in Harvey; that on May 17 she followed her husband into defendant's place of business and requested him not to sell any more liquor to her husband because it was making him crazy; that in reply to this request defendant told her that he was making his living that way and would sell liquor to her husband if he wanted to. Defendant denies that he ever sold plaintiff's husband liquor and plaintiff's version of this conversation. Plaintiff's story is corroborated by the testimony of her husband and also by another witness who testified that, on the day following the date of the request of plaintiff to defendant not to sell liquor to her husband, the witness went with Poe to defendant's place of business and bought two drinks of moonshine. Plaintiff says that for about a year prior to 1927, although he was earning about $50 a week, her husband contributed not over $150 to the support of herself and her children. The husband testified that he spent $10 a week for liquor and that on May 18 he bought liquor from defendant and became intoxicated; that while in that condition he wrecked an automobile

belonging to his employer and had to pay damages to the amount of $137. He was discharged by his employer June 20, 1927. Plaintiff worked at various places in Harvey and finally joined her husband near their old home in Tennessee, where they were living at the time of the trial.

We cannot say from the record that the conclusion that defendant was guilty as charged was clearly against the weight of the evidence.

Defendant protests against the amount of the judgment, arguing that the amount of damages was not proven and that the court had no right to assess exemplary damages. Actual damages were proven and the statute under which the action was brought permits the plaintiff "to recover actual and exemplary damages."

The evidence was conflicting but we cannot say the court might not properly have found the facts in accordance with the contention of the plaintiff.

The judgment is affirmed.

AFFIRMED.

Matchett, J. concurs;

O'Connor, P. J., dissents.

The trial was not conducted in an orderly manner and an examination of the record discloses the fact that it is impossible to say that the court considered the evidence in arriving at his decision.

belonging to his employer and had in my charge in the course of his duty. He was discharged by his employer June 27, 1917. Certainly notice at various places in Europe and Canada within the period that their job was in Tonawanda, nearly two years after the time of the trial.

We cannot say from the record that the evidence that defendant was guilty as charged was clearly against the weight of the evidence.

Defendant presents again the question of the jurisdiction, arguing that the conduct of lawyers was not proven and that the court had no right to assume responsibility therefor. Several decisions were given on the relative weight which the action was brought permits the plaintiff, the courts without and exercising discretion.

The evidence was conflicting but it seemed to the court might not properly have found the facts in accordance with the contention of the plaintiff.

The judgment is affirmed.

Affirmed.

Hatchett, J. concurs;
O'Malley, J. P., dissents.

The trial was not conducted in an orderly manner and an examination of the record discloses the fact that it is impossible to say that the court considered the evidence in arriving at his decision.

33330

BARNEY B. LIBMAN,
Appellee,

vs.

IRVING I. COHEN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment against him for $663.50.

The judgment was entered August 23, 1928, by confession under a power of attorney in a judgment note. Subsequently, on October 11, 1928, defendant moved to vacate the judgment and filed his affidavit in support of his motion, asserting that on or about July 23, 1928, which is the date of the note, he was indebted to plaintiff in the sum of $[illegible], but in order to fully secure plaintiff it was agreed that the defendant would execute a note in the sum of $[illegible]; that subsequently, August 1[illegible], 1928, plaintiff appeared at defendant's place of business in South Haven, Michigan, and agreed to accept and defendant then and there agreed to pay plaintiff $200 and the further sum of $100 as plaintiff's commissions for making the loan, and that on that date he paid $3[illegible] to plaintiff who then and there promised to cancel the note and mail it to defendant, all of which plaintiff failed to do; that defendant had no knowledge of any judgment being entered against him until October 1, 1928; he asked that the judgment be vacated and set aside and the cause set down for hearing.

The record shows that the plaintiff's attorney objected to the motion on the ground that the defendant's affidavit was "false and perjurous." The court stated that in view of the fact that the affidavit might be false, he would permit the

defendant to appear and defend only on condition that he deposit with the clerk the amount of the judgment in cash. Defendant's attorney objected to the condition, but the court persisted in holding that he would set aside the judgment only on the condition of a cash deposit, and the defendant refusing to comply with the condition the motion was denied.

It is too well settled to require citation of cases that on a motion to set aside a judgment by confession the truth or falsity of the affidavit is not decisive of the motion. Courts exercise equitable control of judgments by confession and may open them and permit a defense where equitable grounds for so doing are presented.

This general rule seems to be admitted by counsel for plaintiff who argues, however, that the affidavit does not either expressly or by necessary implication say that the note referred to in the defendant's affidavit is the same note on which judgment was entered. In view of the record showing that the judgment was entered on the $600 note and that the affidavit was filed in that matter, the reference in the affidavit to the $600 note could by no possibility refer to any other note than the one on which judgment was entered.

It is suggested that defendant's affidavit is not in accordance with certain rules of the Municipal court, but such rules are not before us and we cannot take judicial notice of them.

The court had no power to require the defendant to make a cash deposit of the amount of the judgment as a condition precedent to the opening up of the judgment. McGuire v. Campbell, 58 Ill. App. 188; Page v. Wallace, 37 Ill. 84.

The affidavit presented a sufficient defense and defendant's motion should have been allowed.

For the reasons indicated the order denying defendant's motion is reversed and the cause remanded for a trial.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

information to appear and thereby cause a condition that is inconsistent with the claims the owners of the judgment to seek. Defendant's attorney relented in the condition, but his court insisting on making that he would not modify the judgment only on the condition of a good insolvent, but the defendant refused to provide the condition the motion was denied.

It is the well settled in Canada jurisdiction of those that an action to set aside a judgment by confession on grounds of laches of the plaintiff is not dependent on the motion. Courts exercise equitable authority of jurisdiction to determine not only from that and provide a defined fiscal jurisdiction provided for a judge are presented.

This general rule appears to be applied to equitable the plaintiff was serious, however, that the attorney has not either appeared or by necessary institution and that the rule referred to in the defendant's affidavit in the main case in which judgment was entered. In view of the above decision that the judgment was entered on the 25th day and that the affidavit was filed in that matter, the reference to the affidavit on the 26th date would be no possibility rather in any other case that the on which judgment was entered.

It is apparent that defendant's affidavit is not in accordance with Canadian rule 1 for Ontarian court, and that rules are not mere on the to which the Canadian courts is bound.

The court has to power to exercise the judgment to make a good insolvent of the owners if the judgment on a condition precedent to the opening up of the judgment. Kendall v. Lawrell, 38 Ill. App. 180; Cheney v. Bullard, 21 Ill. 64.

The affidavit presented a sufficient defense and defendant's motion should have allowed.

For the reasons indicated and order denying defendant's motion is reversed and the cause remanded for a trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McDonald, J., concur.

32637

VILOCO RAILWAY EQUIPMENT CO.,
a Corporation,
Appellant,

vs.

GUILFORD S. TURNER, FRED S. ZIMMERMAN, T-Z RAILWAY EQUIPMENT CO., a Corporation, and AURORA METAL CO., a Corporation,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

252 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the complainant from a decree which dismissed its bill for want of equity and dissolved a temporary injunction. The cause was heard upon exceptions to the report of a master, and the decree over-ruled the exceptions.

The complainant is a corporation formerly known as Harry Viessering Company. For more than twelve years last past it has been engaged in the business of selling railway supplies. The defendants Zimmerman and Turner are stockholders of the complainant company, and in the year 1926 were members of its board of directors. Turner was the president and Zimmerman the secretary. The T-Z Railway Equipment Company is an Illinois corporation organized by defendants Zimmerman and Turner on February 25, 1927, for the purpose of carrying on the same business in which complainant is engaged. Its office has been located in the building in which for many years complainant has conducted its business. The defendant Aurora Metal Company manufactures an article known as Crescent Metallic Packing, which consists of crescent shaped segments intended to fit around the piston rod of locomotives, and while permitting proper play in the piston rod prevents the leakage of steam. This article was patented. The original patent No. 12806 was issued on June 2, 1908, and the Aurora Metal Company had an exclusive license to manufacture, sell

(Sd. JOHN E. ELLIOTT) BRITISH VAN DYKE'S OF NEW YORK.

This order is by the Commissioner from a Lower Court dismissed the bill for want of equity and granting a temporary injunction. The order was based upon complaint of the owner of a motor, and the lower court accepted his testimony.

The complainant is a manufacturing corporation known as Perry Vibrating Company. For more than twelve years that corporation has been engaged in the business of selling various medicines. The corporation discovered that tumors are characteristic of the complaint company, and in the year 1907 began manufacture of the Perry of Medicine. Thereby was the production and distribution the corporation. The defendant Company is an Illinois corporation which organized by interstate Commerce and Tumor or Company 25, 1907, for the purpose of carrying on the same business in which complainant is engaged. The plaintiff has been located in the building in which for many years small boxes are manufactured by business. The defendant Company began carrying on business in Illinois works on or about January 1, 1908, and results of cancerous tumors upon complaints included in the plaintiff and of incomparative. An still pending proper step in the matter has prevents the issuance of order. This appears from evidence. The original notice to. Plaintiff was issued on June 4, 1908, and the service total through and or existence limited to manufacture, and

and use. For years prior to December 28, 1921, complainant purchased this Crescent Metallic Packing from the defendant Aurora Metal Company and sold the same to its customers. On that date the Aurora company and complainant entered into a written agreement whereby the Aurora company undertook to grant to complainant the exclusive right to sell this article. As the rights of the complainant are based upon this written agreement, we set it up verbatim:

"MEMORANDUM OF AGREEMENT made and entered into this 28th day of December, 1921, by and between the Aurora Metal Company, a corporation having an office at Aurora, Illinois, as first party, and Harry Vissering & Company, a corporation having an office at Chicago, Illinois, as second party.

Whereas, the first party is the sole and exclusive licensee for itself and assigns, to manufacture, sell and use and to grant to others the right to manufacture, sell and use certain piston rod packing covered by United States Letters Patent Reissue No. 12,806, dated June 2, 1908, and known as Crescent Metallic Packing.

Now, therefore, for and in consideration of the sum of One ($1.00) Dollar, lawful money by each of the parties hereto to the other in hand paid, the receipt thereof is hereby acknowledged, and for and in consideration of the mutual promises herein contained, the parties hereto do hereby covenant and agree as follows:

1. The said first party does hereby grant to the said second party the exclusive license and right to sell said Crescent Metallic Packing, and all other articles made under said Letters Patent, upon the terms and conditions hereinafter set forth.

2. Said license shall exist for the term of the patent on said Crescent Metallic Packing, or any renewals or re-issues thereof, but shall terminate if said patent or any claim thereof or any renewals or re-issues thereof, or the license of the first party hereinbefore recited is declared void or invalid, but if said license or right shall be terminated, the second party shall be entitled to receive a commission equal to ten (10%) per cent of the gross price of all sales made during the five years next ensuing after said termination for the replacement or repair of packings previously sold by the second party, but said Ten (10%) per cent shall be payable only on the moneys collected and received by said first party, or its assigns on said sales.

3. The said second party agrees to use its best endeavor to promote the sale of the said Crescent Metallic Packing and are not to take up the sale or be interested either directly or indirectly, in the sale of any other packing, during the life of this agreement, save and except, packings for purposes for which the party of the first part will not furnish said Crescent Packings promptly and at a reasonable price, during the life of this agreement. The said second party shall bear all expenses incident to the making of such sales and the selling price of the packing shall be entirely optional with it. The first party agrees to furnish at its own expense reasonable expert services, (in the way of a man) to look after the installation, care and any trouble that occurs in the service, or with said packings.

suit was. For years prior to December 14, 1925, complainant purchased this Crescent Metallic Packing from the defendant [illegible] [illegible] Company [illegible] the same [illegible] Company. In [illegible] they [illegible] and complainant entered into a written agreement whereby the [illegible] Company [illegible] to grant to complainant the exclusive right to sell this article. As the rights of the complainant are based upon this written agreement, we set it out verbatim:

THIS AGREEMENT made and entered into this 14th day of December, 1925, by and between [illegible] a corporation having an office at [illegible], Illinois, as first party, and Harry Vissering & Company, a corporation having an office at Chicago, Illinois, as second party.

Whereas, the first party is the sole and exclusive licensee for itself and assigns, to manufacture, sell and use and to grant to others the right to manufacture, sell and use certain piston rod packing covered by United States Letters Patent No. [illegible], dated June [illegible], and known as Crescent Metallic Packing.

Now, therefore, for and in consideration of the sum of One ($1.00) Dollar, lawful money by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, and for and in consideration of the mutual promises herein contained, the parties hereto do hereby covenant and agree as follows:

1. The said first party does hereby grant to the said second party the exclusive license and right to sell said Crescent Metallic Packing, and all other articles made under said [illegible] upon the terms and conditions set forth.

2. Said license shall exist for the term of [illegible] said Crescent Metallic Packing, or any [illegible] thereof; [illegible] said [illegible] or any claim thereof of any [illegible] or [illegible] thereof, or the license of the first party thereunder be declared void or invalid, and if said license or right shall be terminated, the second party shall be entitled to receive a commission equal to ten (10%) per cent of the gross price of all sales made during the five years next ensuing after such termination for the replacement of packings previously sold by the second party, but said ten (10%) per cent shall be payable only on the amount collected and received by said first party, on its [illegible] on said sales.

3. The said second party agrees to use its best endeavor to promote the sale of the said Crescent Metallic Packing and [illegible] to take up the sale or be interested either directly or indirectly, in the sale of any other packing, during the life of this agreement, save and except, packings for purposes for which the party of the first part will not furnish said Crescent Packings promptly and at a reasonable price, during the life of this agreement. The said second party shall bear all expenses incident to the making of such sales and the selling price of the packing shall be entirely optional with it. The first party agrees to furnish at its own expense reasonably competent services, [illegible] the way of a man) to look after the installation, care and any trouble that occurs in the packing, at [illegible] sale premises.

4. All packing or parts furnished under this agreement by the said first party to the second party shall be sold on the following terms, namely. Thirty days net.

5. The first party is to be known in all cases as the manufacturer of Crescent Packing, and the second party the distributor, which shall be plainly stated on all shipping tags, catalogues, and advertising literature which are used in the Crescent Packing business.

6. If at any time during the life of this contract said first party shall desire to sell its right to manufacture, sell and use and its right to grant to others the right to manufacture, sell and use said Crescent Metallic Packing, it shall have the right to sell said rights and terminate this contract upon giving Ninety Days written notice to said second party and on the following conditions:

Said second party shall have the first option to purchase said rights for an amount equal to the best bona fide offer obtainable by said first party, which option shall exist for a period of sixty days after notification of the first party's intention to sell at a stated price. Failing to exercise this option said second party shall be entitled to receive Twenty-five (25%) per cent of the purchase price received for said rights, which said Twenty-five (25%) per cent shall be payable proportionately as payments are received by the first party.

7. The Aurora Metal Company agrees to protect and to keep safe and unprejudiced the said Harry Vissering & Company in its unrestricted enjoyment of the rights granted to it by these presents, and to save it harmless from all patent and other litigation, and all costs, penalties, damages, fees and expenses on account thereof by reason of its sale of said Crescent Packing and agrees that in the event of its failure so to do or to successfully maintain or defend any patent infringement suit or suits brought by or against it or anyone else on account of said Crescent Packing, then and in that event the said Harry Vissering & Company may, at its election, either terminate this agreement upon sixty (60) days' written notice to the Aurora Metal Company, or maintain and defend such suits at its own expense, for which purpose and this purpose only, the Aurora Metal Company hereby constitutes Harry Vissering & Company, aforesaid, its attorney with full powers to do everything necessary or desirable in the premises.

In witness whereof, the respective parties hereto have hereunto interchangeably set their hands and affixed their seals, by their duly authorized officers, the day and year first above written."

The bill alleges that in the autumn of 1926 Turner and Zimmerman, while directors and officers of the complainant corporation, formed the intention of wrongfully depriving complainant of its business in Crescent Metallic Packing and pursuant to that design, while still officers and directors, entered into negotiations with the defendant Aurora Company, persuading it to violate its contract and desist from furnishing to complainant supplies of Crescent Metallic Packing. The bill avers, and the proof tends to

6. All records of such individual motor club agreements by the said first party to the second party shall be held as the property thereof, during the term hereof.

8. The first party is to be given at its option a non-exclusive franchise of Oregonian Dealership, and shall operate the distributor, make sales to dealers, and sell motor club memberships, and advertising literature which are now in the Oregonian Dealership Department.

9. If at any time during the life of this contract, the first party shall decline to sell the right to manufacture, sell and use the Oregonian Dealership Department, or shall have the right to sell rights and franchise with contract and giving ninety days written notice to said second party, and the following conditions:

Said second party shall have the first option to purchase said rights for a period of ninety days from the date of such notice by said first party, which option shall cover a period of ninety days after exclusive of the first period, in which to sell a second party. Failure to exercise said option shall release said party shall be entitled to transfer franchise (?) per month of the gross income received for said rights, which shall terminate (?) per month as provided for ninety days payments are received by the first party.

7. The Oregon Motor Company agrees to perform and to keep and maintain the said Dealership Department a department established exclusively for the sales of the said motor cars, and to save it harmless from all claims and demands, and all costs, liabilities, damages, fees and expenses on account, direct or indirect, by reason of the sale of said motor cars and agrees that in the event of the failure on its or to exercise its rights or defend any action brought against it or with the right by or against it or against the said second party, at the option of the said second party, either assume the defense of the said action, or pay the said second party the amount paid (?) days' written notice to the Oregon Motor Company, in matters and defend such action as its own expense, the said second and said second party, the said Oregon Motor Company, for which purpose and said second party, the said second party, hereby, for attorney with full power to do everything necessary or desirable in the premises.

In witness whereof, the respective parties hereto have hereunto subscribed their names and affixed their seals, by their duly authorized officers, the day and year first above written.

The Kill Judge that in the course of 1924 Oregon Motor Company, with interests and affiliations of the manufacturer organization, formed the intention of wrongfully depriving complainant of its business in Oregon. Detailing [illegible] and [illegible] design, with skill efficiency and diligence, whereas into negotiations with the Oregonian Motor Company, proceeding 1, to retain its contract and basis [illegible] to manufacture qualities of Oregonian Dealership Department. The Kill every, and the plant [illegible]

show, that after negotiations with Turner and Zimmerman, on January 20, 1927, the Aurora Company notified complainant that on March 1, 1927, it would discontinue selling Crescent Metallic Packing to the complainant, and that if the threat had been carried out it would have been impractical for complainant to fulfill its contracts with its customers with reference to the sale of that product. The bill also avers, and the proof tends to show, that the defendant Aurora Company knew that these defendants were directors of the complainant corporation while negotiating with Turner and Zimmerman.

The prayer of the bill is for an injunction restraining Turner, Zimmerman and the T-Z Railway Equipment Company from inducing the Aurora Company to discontinue furnishing Crescent Metallic packing to complainant and restraining the Aurora Company from furnishing Crescent Metallic Packing to the other defendants.

The contract provided that it should exist for the term of the patent "or any renewals or re-issues thereof." This patent by its terms expired on June 2, 1925. It was not extended or re-issued, and the Aurora company contends that because of the expiration of the patent the contract by its terms expired and the complainant has no rights thereunder. It appears, however, that on January 13, 1925, the Aurora Company obtained a new patent for an improvement in Crescent Metallic Packing; that some time thereafter it began the manufacture thereof and from time to time furnished to the complainant a sufficient supply to fill orders which the complainant had received. There is correspondence in the record tending to show that complainant and the defendant Aurora Company co-operated together in the selling of the packing and that both parties seemed to recognize that the new article should be sold subject to all the terms and provisions of the old contract. There is also oral evidence from which a renewal of the license according

to the terms and provisions of the old contract could be inferred and which, if true, might also be held to amount to at least an implied and exclusive grant of a license to the complainant, although the finding of the master is to the contrary. However, whether that finding is justified we find unnecessary to a decision of the case.

There is also a conflict in the evidence with reference to the alleged abuse of fiduciary relations with the complainant by the defendants Turner and Zimmerman. In the year 1926, while Turner was president of the company, Charles F. Long, Jr., as the owner of 260 shares of complainant's 600 shares of capital stock, controlled and dominated the company. As early as February, 1926, there had been talk of dispensing with the services of both Turner and Zimmerman, and afterwards the same matter was discussed from time to time. On December 31st of that year Long notified Turner that his services would no longer be required but that his salary would be paid up to January, 1927. It also appears that on that day Long assumed the duties of president of the complainant company and continued to perform the duties of president thereof until January 18, 1927, when he was elected president by the board of directors of the company. Although the board of directors met on December 31, 1926, Turner did not resign, and the board of directors did not, as Long insisted they did, take any action at that time toward his removal. Notwithstanding this, Long wrote letters to numerous customers and employees of the company informing them that Turner had been superseded, and Turner wrote denying that he had tendered any resignation and insisting that he was still the president. As a matter of fact, he was paid and accepted his salary for January, 1927, amounting to $454.17. On January 31, 1927, he also turned in an expense account amounting to about $465, including items of expense incurred prior to December 31,

1926, and up to January 27, 1927. On December 31, 1926, Long told Zimmerman that "he was a very impudent and unappreciative young man." However, on January 18, 1927, Zimmerman was elected a director, vice-president and secretary of the complainant company, but having withdrawn his name on January 25, 1927, when nominated as director of another company controlled by Long, he then informed Long that he had decided to resign but that he would remain thirty or 60 days in order that arrangement might be made to fill his place. Long responded January 27th by a letter in which he told Zimmerman that his relations with the complainant company would cease January 31st. However, on February 11, 1927, Zimmerman wrote Long and another stockholder, Hollingshead, reminding them that he was still vice-president, director and secretary of the complainant company and that he anticipated receiving regular notices as to the dates of directors' meetings, etc. At this time Dr. Thurnauer was the secretary of the Aurora Metal Company and on January 6, 1927, Turner opened up negotiations with Thurnauer with reference to handling the Crescent Metallic Packing for the Aurora Metal Company. Turner again talked with Dr. Thurnauer about this matter on January 19th or 20th thereafter, prior to the organization of the T-Z Railway Equipment Company. On January 26th Turner told Thurnauer that he had been dismissed by complainant and asked him whether the Aurora company would turn over the packing business to him. Thurnauer replied that he would have to take the matter up with his associates. On January 19th or 20th Thurnauer told Turner that the Aurora Metal Company had decided to sever its connections with the complainant and would give him the representation for the metallic packing. On January 28, 1927, Turner and Zimmerman leased offices in the same building in which complainant conducted its business and which were occupied by the T-Z Railway Equipment Company after its incorporation on February 23, 1927.

1920, and by 31 January 47, said, "We believe it, [illegible], long ago
Alexander Cook "he was a very learned and conscientious young
man." However, on January 16, 1947, Alexander was elected a
director, vice-president and secretary of the Cook Iron Works,
but having withdrawn his name on January 31, 1947, was confirmed
as director of another company employing [illegible], in that capacity
long that he had evaded [illegible] that he would resign within
or 30 days in order that [illegible] might be made in this his
place. Long resumed [illegible] by a letter in which he says
Alexander that his relations with his [illegible] employing
[illegible] Iron Works. However, on February 11, 1947, Alexander wrote
long and [illegible] [illegible], [illegible] that he had
[illegible] vice-president, [illegible] or the [illegible]
[illegible] be [illegible] requires actions in
the [illegible] of [illegible], etc. [illegible] Alexander
was the secretary of the [illegible] Company and on January 4,
1947, [illegible] signed by [illegible] Alexander [illegible] reference
to handling the [illegible] [illegible] the [illegible]
Company. [illegible] Alexander about this [illegible]
on January [illegible] [illegible], [illegible] on the [illegible]
the I-C Building [illegible] Company. On January [illegible]
Alexander [illegible] to [illegible] [illegible]
[illegible] the [illegible] [illegible] [illegible]
[illegible]. Alexander replied [illegible] [illegible]
with his [illegible]. On January [illegible] Alexander [illegible]
There [illegible] [illegible] [illegible] [illegible]
[illegible] for the [illegible] [illegible]. On January 28, 1947, [illegible]
[illegible] offices in the [illegible] [illegible]
the [illegible] [illegible] were [illegible] by the I-C [illegible]
Company after its [illegible] on February 28, 1947.

The master did not make any specific finding as to the several dates upon which Turner and Zimmerman terminated their official relationship with the complainant company nor as to the respective times at which their fiduciary relationship ceased to exist.

The legal rule which decrees that officers and directors stand in a fiduciary relationship to the stockholders whom they represent is well established and salutary. They may not while such relationship exists take advantage of their positions to wrest from the corporation business or privileges which it is their duty to acquire, preserve and protect for the corporation. Law and equity both require the utmost loyalty in these respects. Farwell v. Fyle-National Electric Headlight Co., 289 Ill. 157, and Consumers Co. v. Parker, 227 Ill. App. 582, are particular instances of many similar cases which might be cited as sustaining this doctrine. Difficult as it might be under the evidence to determine the precise time when these defendants ceased to be obligated in a fiduciary way, such a finding was necessary to a determination of the rights and duties of the parties. Long, of course, had no right to remove Turner as president simply because Long was a majority stockholder. Turner protested, as he had a right to do, that he was still president of the company. Long by his conduct became president de facto, but Turner was president de jure. It seems no more than just to hold that his duties did not cease nor his obligation of loyalty to the corporation end while the corporation continued to pay his salary. He had neither a moral nor a legal right to take complainant's money while seeking to deprive it of valuable business, and this whether he was an officer de facto or de jure. He might not rightfully betray the corporation whether serving it in the one capacity or the other. The record leaves no doubt that while officers and directors they, Turner and Zimmerman, confederated together for the purpose of depriving the complainant

The master did not make any specific finding as to the several dates upon which Turner and Zimmerman incorporated their official relationship with the complainant company nor as to the respective times at which their fiduciary relationship ceased to exist.

At least this much appears that Turner and Zimmerman stood in a fiduciary relationship to the complainant when they conceived the idea of a competing company. They may not while such relationship existed take advantage of their position to wrest from the corporation business or privileges which it is their duty to acquire, conserve and protect for the corporation. Law and equity both require the utmost loyalty in such matters. Farrell v. International Firearms Exporting Co., 296 Ill. 247, and Drummond v. Parker, 199 Ill. App. 522, are outstanding instances of many similar cases which might be cited as sustaining this doctrine. Difficult as it might be under the evidence to determine the precise time when these defendants ceased to be obligated in a fiduciary way, such a finding was unnecessary to a determination of the rights and duties of the parties. Turner, of course, had no right to [illegible] Turner as president simply because they were a majority stockholder. Turner apparently, as he had a right to do, [illegible] that he was still president of the company. Even by his conduct became president de facto, but Turner was president de jure. It seems to me that just as long as he [illegible] and there was the old obligation of loyalty to the corporation and while the corporation continued to pay his salary. He had neither a moral nor a legal right to take complainant's money while engaged in [illegible] of valuable business, and this whether he was an officer de facto or de jure. He could not rightfully betray the corporation whether serving it in the one capacity or the other. The record leaves no doubt that while officers and directors they, Turner and Zimmerman, confederated together for the purpose of depriving the complainant

of its exclusive right under its contract with the Aurora Metal Company.

All these things being conceded, as well as the further contention of complainant that it is without a full, adequate and complete remedy at law, there yet remains for consideration the question of whether, under the facts as disclosed in the bill, complainant is entitled to the relief prayed for. The granting of a permanent injunction amounts to the giving of an extraordinary remedy, and its application is necessarily limited to cases where the remedy is appropriate to the subject matter. There are wrongs which even the arm of a court of equity is not long enough to reach. Complainant here seeks in essence to have the court grant specific performance of its contract with the defendant Aurora Metal Company through enjoining that company from dealing with another, and the courts of this state seem to be thoroughly committed to the doctrine that in general an injunction will not be granted in such case, except where specific performance of the contract would be decreed. Lancaster v. Roberts, 144 Ill. 213; Winter v. Trainor, 151 Ill. 191; Welty v. Jacobs, 171 Ill. 624; Bauer v. Lumachi Coal Co., 209 Ill. 316; Allott v. American Strawboard Co., 237 Ill. 55; Barker v. Kauberg, 325 Ill. 545; Pomeroy's Equity Jurisprudence, vol. 6, sec. 769. These authorities seem to settle the proposition as stated in Winter v. Trainor, supra: "Unless a contract can be specifically enforced as to all parties, equity will not interfere." So far as we are aware, there are only two exceptions to this rule, the one being with reference to contracts which call for personal services of a distinguished professional character, such as the services of a great singer, and the other, where a temporary injunction is granted for the purpose of preserving the status until such time as the court may become informed as to the merits of the controversy. The facts of this

of the exclusive rights which the appellant has with the Canal Company.

All these things being conceded, we fail to see further protection of complainant than it is already [illegible]. Complainants had adequate remedy at law, there yet remains the consideration the question of whether, under the facts as disclosed in the bill, complainant is entitled to the relief prayed for. The granting of a mandatory injunction amounts in its effect to an extraordinary remedy, and its application is necessarily limited to cases where the remedy is appropriate to the subject matter. There are strong cases where the arm of a court of equity is not long enough to reach. Complainants have asked us expressly to find the court grant specific performance of the contract with the Southern Armature Metal Company through enjoining that concern from dealing with another, and the courts of this State seem to be thoroughly committed to the doctrine that in general an injunction will not be granted in such case, except where specific performance of the contract would be decreed. Lexington v. Johnson, 153 Ill. 589; Tinkle v. Dramers, 183 Ill. 153; Tribe v. James, 175 Ill. 590; Baker v. Eastern Coal Co., 160 Ill. 328; Kinsey v. Sanitary Drainage Board Co., 207 Ill. 89; Sackett v. Nicholson, 165 Ill. 541; Pomeroy's Equity Jurisprudence, vol. 4, sec. 1341. These authorities seem to settle the proposition as stated in Schutt v. Nicholson, supra: "Unless a contract can be specifically enforced as to all parties, equity will not interfere." So far as we are aware, there are only two exceptions to this rule, the one being with reference to contracts which call for personal services of a distinguished professional character, such as the services of a great singer, and the other, where a temporary injunction is granted for the purpose of preserving the status until such time as the court may become informed as to the merits of the controversy. The facts of this

case are not brought within either of these exceptions. Where a contract is such that a court cannot in the nature of things compel its performance, where the performance of a contract would be worse than its nonperformance, where there is an incapacity to perform the contract, where there has been a failure of the consideration, where the contract is not mutually obligatory upon the parties, or where for any cause it would be unequitable, unjust or impossible to perform the same, - equity will not decree specific performance either directly by a command to perform or indirectly by an injunction which forbids one of the parties from dealing with some other person. When we come to look at this contract from this standpoint, we notice in the first place that it is terminable at the will of the defendant Aurora Metal Company upon giving ninety days notice. There is high authority to the effect that a court of equity will not grant specific performance where the power of revocation exists in the contract. Fry on Specific Performance, p. 64; Southern Express v. Western North Carolina R. R. Co., 95 U. S. 191 (25 L. Ed. 319). It would hardly seem appropriate to grant a decree where the whole matter might afterwards be settled and the contract avoided by a ninety days notice. Such decree would obviously be of little or no benefit to the party in whose favor it was entered.

Again, when we come to look at this contract, we find that the rights of the parties thereunder are indefinite and uncertain. As the master points out, it imposes upon the complainant practically only one obligation, namely, to use its best endeavors to sell the packing upon terms of thirty days net. This obligation is limited by the language of paragraph 3, which provides that the complainant may sell other packing when the Aurora Metal Company "will not furnish said Crescent Packings promptly and at a reasonable price." The contract therefore leaves it wholly optional

case are not brought within either of those exceptions. Where a contract is such that a court cannot in the nature of things compel its performance, where the performance of a contract would be worse than its nonperformance, where there is no inequality in getting the contract, where there has been a failure of the consideration, where the contract is not mutually obligatory upon the parties, or where for any reason it would be inequitable, unjust or impossible to perform the same, - equity will not decree specific performance either directly by a judgment to perform or indirectly by an injunction which forbids one of the parties from dealing with some other person. When we come to look at this contract from this standpoint, we notice in the first place that it is terminable at the will of the defendant Aurora Metal Company upon giving ninety days notice. There is high authority to the effect that a court of equity will not grant specific performance where the power of revocation exists in the contract. Fry on Specific Performance, p. 54; Southern Express v. Western North Carolina R. R. Co., 99 U. S. 191 (25 L. Ed. 319). It would hardly seem satisfactory to grant a decree where the other party might afterwards [illegible] and the contract ended at a ninety days notice. Such decree could obviously be of little or no benefit to the party in whose favor it was entered.

Again, when we come to look at this contract, we find that the rights of the parties thereunder are indefinite and uncertain. As the master points out, it appears that the complainant practically only one obligation, namely, to use its best endeavors to sell the packing made under it during that time. That obligation is limited by the language of paragraph 1, which provides that the complainant may sell other packing than the Aurora Metal Company "will not furnish said Company's packings promptly and at a reasonable price." The contract therefore leaves it wholly optional

with the Aurora Metal Company as to when it will furnish the packing to the complainant and as to what prices it will charge the complainant for such packing when furnished. There is no provision as to what the prices will be, and the contract sets forth no method by which such price could be determined. Neither does the contract provide any method by which it could be determined what remedy the Aurora Metal Company would have in case the complainant failed to use its best endeavors in selling this article. Obviously the only course open under the terms of the contract would be to give notice of its termination as provided in article 6. If a decree were entered in the case in favor of the complainant and complainant's contention upheld upon every point, the Aurora Metal Company might under the terms of this contract give notice of its termination and the decree would at once become a nullity. It can hardly be said that a contract, which imposes upon a party a duty so indefinite and uncertain that no one can tell exactly what it is and which in case of the violation of that duty gives to the other party no remedy other than that of terminating the contract, is mutually binding. Because, therefore, of its lack of mutuality, of its uncertainty, and because by its terms it gives to one of the parties the power to terminate and thereby nullify any decree that might be entered in this case, it must be held that the contract cannot be specifically performed either directly by a decree or indirectly by an injunction.

For this reason the decree of the trial court must be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

with the Aurora Gas Company as to when it will [illegible] the pipe-line in the Commissioner and to its that prices it will charge the consumers for such gas when installed. There is no evidence on to what the prices will be, and the contract also does not [illegible] by which such price shall be determined. Rather than the contract provides any method by which it could be determined that exactly the Aurora Gas Company would have to pay the [illegible] failed to use its best endeavors in getting this information. Evidently the only source upon which the terms of the contract would be to give notice of its termination as provided in article 6. If a dispute were not had in the case of the commissioner and complainant's contention would upon every point. The Aurora Gas Company might under the terms of this contract [illegible] of its termination and the factor would of some [illegible] a [illegible]. It can hardly be said that a contract, which imposes upon a party a duty so indefinite and uncertain that no one can tell exactly what it is and also in case of the violation of that duty gives to the other party no remedy other than that of terminating the contract, is [illegible] binding. Because, therefore, of the lack of mutuality of its undertaking, and because by its terms it gives to one of the parties the power to terminate and thereby nullify any duties that might be created in its case, it must be held that the contract cannot be specifically performed either directly by a decree or indirectly by an injunction.

For this reason the decree of the trial court must be affirmed.

AFFIRMED.

C'Connor, P. J., and Kennedy, J., concur.

32938

A. W. JENSEN,
Appellant,

vs.

ALBERT GROSBY et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

13 A

252 I.A. 646 2

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the complainant from a decree entered in a proceeding brought by him to foreclose an alleged mechanic's lien. The cause was heard upon exceptions to the original and supplemental reports of the master to whom the cause had been referred. Certain exceptions of certain defendants were sustained and a decree entered.

Jensen, the complainant, is a mason contractor and builder, defendant Albert Grosby the owner of certain premises against which the lien is claimed, and the defendant Madison & Kedzie State Bank, the trustee named in a trust deed conveying the property as security for a loan of $115,000 negotiated by the owner for the purpose of completing a proposed building on the premises. The bill of complaint was filed October 30, 1925.

On December 5, 1924, the owner, Albert Grosby, entered into a contract with Paul A. Schroter whereby Schroter was to provide materials and labor necessary for the masonry and carpenter work in the building to be erected on the premises, for which the owner agreed to pay $36,750.

On January 21, 1925, Schroter sublet a portion of this work to the complainant Jensen, agreeing to pay the sum of $23,000 to Jensen for labor and material described in the contract. The contract provided that the work should be done to the satisfaction of the architect and superintendent, Charles Liska; that a payment of 85 per cent of the estimated value of the same should

be made on certificates of the superintendent as the work progressed, and it was agreed that 15 per cent should be reserved as security for the faithful performance and completion of the work and might be applied under the direction of the superintendent in the liquidation of any damages. Jensen further agreed that whenever requested he would furnish a release from any lien or right of lien. The trust deed to the defendant Madison & Kedzie State Bank was dated December 2, 1924, and recorded December 6, 1924, in the recorder's office of Cook county.

The master's report found that the owner and trustee were not informed of the contract between Schroter and the complainant and that complainant did the work according to plans and specifications to the satisfaction of the architect; that complainant completed same on August 4, 1925.

On January 21, 1925, Crosby made an owner's affidavit setting forth the names of the contractors who had agreed to furnish material, or perform work or labor, in the construction of the building, and delivered the same to the trustee Bank for the purpose of procuring the proceeds of the bonds. Schroter was named therein as contractor for the mason and carpenter work and the amount of his contract placed at $56,750. Other amounts showed a total amount due or to become due to the contractors for the building amounting to $107,175.

On January 23, 1925, Schroter delivered to the trustee Bank a contractor's affidavit and statement as required by section 5 of the lien law. The statement contained the names of all sub-contractors, the kind of work each was to do, the amount due and unpaid and the amount to become due thereafter. Upon this statement appeared the name of Jensen, the complainant, as sub-contractor for mason work to be done for the total amount of $23,000.

by such contribution or the subcontractors as the case may
arrange, and it was agreed that JS may call upon Lynch to
assume responsibility for the material procurement and availability of the work
and might be applied under the direction of the subcontractors in
the alleviation of any difficulty. Without further proof that company
requested an order issued to Lynch for the sum of $[illegible] or less, or
the board that in the intended contract a clause that such work was
dated December 8, 1944, and therefore December 6, 1944, in the sum ex-
cedar's office at Lynch County.

The master's report found that the power and jurisdic-
were not delegated to the contract between Hudson and the contract-
and not that commissioner did not have authority to give the agreement
directions to the relationship of the principal; that contract
concluded some on August 4, 1944.

On January 22, 1945, Lynch made by Hudson's affidavit
setting forth the terms of the contractors that agreed to furnish
material, or perform work or labor, in the construction of the
building, and delivered the same to the trustee Bank for the purpose
of preserving the proceeds of the lands. Hudson was hired labor
as contractor for the means and carpenters work and the amount of
his contract placed at $[illegible]. Lynch provided should a total
amount due or to become due to the contractor for the building
amounting to $[illegible].

On January 23, 1945, Hudson delivered to the
trustee Bank a contractor's affidavit and statement in terms
by section 5 of the lien law. The statement contained the names
of all sub-contractors, the kind of work each was to do, the amount
due and unpaid and the amount to become due thereafter. Upon this
statement entered the name of Jackson, the contractor, as sub-
contractor for mason work to be done for the lien amount of
$[illegible].

On March 20, 1925, the architect issued a certificate stating that the Paul M. Schroter Company was entitled to a payment of $8,000 upon presentation and surrender of the certificate and contractor's affidavit with a waiver of lien by complainant. On March 23rd complainant Jensen, as agent for Schroter, executed an affidavit and statement which appear on the reverse side of the certificate, reciting in substance that the waivers of the lien of contractor and sub-contractors then presented and delivered by affiant to the trustee bank on the date thereof were true, correct and genuine and signed by the respective contractor or sub-contractors whose names appeared thereon; that each and every waiver was delivered to the affiant unconditionally by the respective contractor or sub-contractors who signed the same; that the waivers were not obtained by the affiant through any fraud, accident, mistake or duress nor delivered upon any condition whatsoever, and that there was no claim either legal or equitable which might be set up to defeat the validity of these waivers. This affidavit also stated there was due and unpaid to complainant Jensen $9400 and that there was to become due him for unfinished work $13,600.

Jensen also delivered a waiver of lien, as follows:

"St"State of Illinois)
_____County) SS.

March 20, 1925.

To All Whom It May Concern:

Whereas, I, the undersigned, A. W. Jensen, ha__ been employed by Paul M. Schroter Co. to furnish for the building known as N.W.Cor. Crawford & Division Str__

Now therefore, know ye, that I, the undersigned, for and in consideration of One dollar, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien, claim, or right of lien on said above described building and premises under 'An Act to Revise the Law in Relation to Mechanics' Liens, approved May 18, 1903, and in force July 1, 1903, on account of labor and materials, or both, furnished up to this date by the undersigned or to or on account of the said Paul M. Schroter Co. for said building or premises.

Given under my hand and seal, this 20th day of March, 1925.

A. W. Jensen (Seal.)"

On March 20, 1925, the architect issued a certificate stating that the Paul A. Sorenson Company was entitled to a payment of $8,000 upon presentation and surrender of the certificate and contractor's affidavit with a waiver of lien by claimants. On March 23rd complainant Jensen, as agent for Sorenson, presented an affidavit and statement which appear on the reverse side of the certificate, recites in substance that the waivers of the lien of contractor and sub-contractors then presented and delivered by affiant to the trustee bank on the date thereof were true, correct and genuine and signed by the respective contractor or sub-contractor whose names appeared thereon; that each and every waiver was delivered to the affiant unconditionally by the respective contractor or sub-contractors who signed the same; that the waivers were not obtained by the affiant through any fraud, coercion, artifice or duress nor delivered upon any condition whatsoever, and that there was no claim either legal or equitable which might be set up to defeat the validity of these waivers. This affidavit also recited there was due and unpaid to complainant Jensen $8000 and that a lien to become due him for work in the amount of $13,000.

Jensen also delivered a waiver of lien, as follows:

"State of Illinois)
County)

March 20, 1925.

To All Whom It May Concern:

Whereas, I, the undersigned, A. W. Jensen, have been employed by Paul A. Sorenson to furnish [illegible] known as K.W. Dr. Stewart & Division Str[illegible]

Now therefore, [illegible] and in consideration of the dollar, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby waive and release any and all lien, claim, or right of lien on said [illegible] described premises under the Act to Revise the Law in Relation to Mechanics' Liens, approved May 16, 1903, and in force July 1, 1903, as amended of 1909 and materials, or both, furnished up to this date by the undersigned or to be furnished by the said Paul A. Sorenson Co. for said building or premises.

Given under my hand and seal, this 20th day of March, 1925.

A. W. Jensen (Seal.)"

April 24, 1925, Paul M. Schroter made a contractor's affidavit stating that the amount due and unpaid to Jensen for work, labor and materials furnished to that date was $12,600, and the amount to become due to Jensen was $1,000. At the same time Jensen executed another waiver of lien under seal, in form the same as the waiver of lien above recited. On the same day, April 24, 1925, the architect issued his certificate to the effect that Paul M. Schroter Company was entitled to a payment of $12,812, upon presentation and surrender of the certificate, together with the contractor's affidavit, as per the form on the reverse side of the certificate, and upon delivery therewith of a final or partial waiver of lien by Jensen. On this occasion Paul M. Schroter is sued the affidavit on the reverse side of the architect's certificate, wherein it was made to appear that there was due and unpaid to Jensen $12,600, and that there would become due to him the further sum of $1,000. These documents were presented to the trustee bank, and by the direction of Paul M. Schroter, the bank at that time paid, from the funds in its hands as proceeds of the loan, to complainant $10,000 and to Paul M. Schroter $2,812.

The chancellor found that the value of the uncompleted work of Jensen under his contract was at that time $1,000.

Schroter did not complete his contract and the owner took over the balance of his work about June 1, 1925. Thereafter payments were made by the owner Grosby to the various sub-contractors upon certificates issued by the architect. When the Schroter contract was completed there was a balance due Schroter of $890.63. August 12, 1925, the complainant served upon Grosby, on the trustee and also on Liska, the architect, notice of a sub-contractor's lien claiming a balance of $5,000 due to him.

The chancellor, sustaining an objection to the report

April 24, 1926, Paul A. Sorrotor made a contractor's affidavit stating that the amount due and unpaid to Paul A. for work, labor and materials furnished to that date was $1,000, and the amount to become due to Paul was $1,000. At the same time Jensen executed another waiver of lien under seal, in form the same as the waiver of lien above recited. On the same day, April 24, 1926, the architect issued his certificate to the effect that Paul A. Sorrotor Company was entitled to a payment of $1,[illegible], upon presentation and surrender of the certificate, together with the contractor's affidavit, as per the form of the reverse side of the certificate, and upon delivery therewith of a final or partial waiver of lien by Jensen. On this occasion Paul A. Sorrotor signed the affidavit on the reverse side of the architect's certificate, whereby it was made to appear that there was due and unpaid to Jensen $1,000, and that there would become due to him the further sum of $1,000. These documents were presented to the trustee bank, and by the direction of Paul A. Sorrotor, the bank at that time paid, from the funds in its hands to proceeds of the loan, to complainant $10,000 and to Paul A. Sorrotor $2,[illegible].

The complainant found that the value of the unfinished work of Jensen under his contract was of that date $1,000.

Sorrotor did not complete his contract and the owner took over the balance of his work about June 1, 1926. Sorrotor payments were made by the owner directly to the various sub-contractors upon certificates issued by the architect. When the Sorrotor construct was completed there was a balance due under of $[illegible]. August 19, 1926, the complainant served upon Sorrotor, on the trustee and also on liens, the architect, notice of a sub-contractor's lien claiming a balance of $1,000 due to him.

The complainant, maintaining in substance to the report

of the master, found that complainant by his waiver of lien dated March 20, 1925, and by the waiver dated April 24, 1925, waived and released all of his lien and claim or right of lien in and to the premises up to the respective dates of the waivers. The court further found that by virtue of the contractor's affidavit dated April 24, 1925, there was yet to become due to complainant for unfinished work and material the sum of $1,000; that Paul A. Schroter was personally liable to complainant under the contract of January 21, 1925, in the sum of $5,000 for the balance due, together with interest thereon from August 4, 1925, at the rate of five per cent per annum, amounting to the further sum of $736.11, making a total principal sum of $5736.11, and decreed that Schroter should pay complainant's costs, amounting to the further sum of $555.26. The chancellor further decreed that complainant had a lien for $1,000 with interest at the rate of five per cent from August 4, 1925, amounting to $147.22, and for the sum of $173.13 for costs, being the excess paid by complainant over and above one-half of the costs in the cause, and that this sum of $173.13 should be taxed as costs against defendants Albert Grosby, Jessie Grosby and the Madison and Medzie State Bank, making a total sum of $1320.35, for which complainant was adjudged to have a first and prior lien upon the real estate and improvements thereon. The decree directed the foreclosure of the lien and sale of the property in case the decree was not satisfied.

The complainant contends that the court erred in decreeing that the waivers of lien were full and complete waivers up to their respective dates; that the trial court committed reversible error in not re-referring the cause to the master for a more specific and definite finding as to the value of the uncompleted work on April 24, 1925, and in apportioning the costs of the respective parties.

It is further contended that the finding of the decree that the value of the uncompleted work on April 24, 1925, amounted to only the sum of $1,000, is clearly and manifestly against the weight of the evidence, and that at any rate the court erred in failing to decree that complainant had a right of lien under the mechanic's lien act on the money due and to become due to Paul M. Schroter on the contract between Grosby and Schroter, since the waivers did not purport to release any lien or right of lien on the money, but only upon the building and premises.

It is contended for the complainant that as he completed his contract and has taken the necessary steps to perfect his lien under the mechanic's lien act, the waivers executed and delivered by him may be considered as valid only to the amounts which were actually paid thereon. It is insisted that such was the purpose for which the waivers were delivered and that these waivers exist only insofar as the parties thereto intended. It is said that a waiver of lien must arise from the consent express or implied of the person who would otherwise be entitled to it, (18 Ruling Case Law 962) and that the court should look to the extrinsic facts to determine the actual consideration and intention of the parties. Paulsen v. Manske, 126 Ill. 72, is cited to this point.

The facts in this case are not at all similar to those which appear in the Paulsen case. It was there proved that the form of release was given only for a specific purpose and in favor of a particular party, the purpose being to give a holder of a certain mortgage priority.

In Turnes v. Brenckle, 249 Ill. 394, our Supreme court said in substance that while such an intention might, when clearly established, limit the operation of a general waiver, still when there was nothing in the context to show a contrary intention, the court would enforce the waiver as agreed upon by the parties.

It is further contended that the finding of fac-
denied that the value of the Mandolinetta was as high as, 1921,
sworn to by the one of plaintiff, is clearly not sufficiently
against the weight of the evidence, and that at any rate the error
error in failing to deduct from the defendant and a part of item
under the mandolin's item and on the money the and to Thomas and
to Paul E. Gunderson or the national Silver Grove, and therefore,
since the witness and not property to attribute any item or right of
item or the money, but only upon the building and furniture.

It is contended the the complainant that in the
plaintiff his contract and that have the economic alone to contract
his item money the mandolin's item and, the values according and
delivered by the may be determined by which only if the months
which were actually paid thereon. It is insisted that the
proceed for which the waivers were initiated and that these waivers
exist only insofar as the parties thereto intended. It is said that
a waiver of item must arise from the intent manifested indicated
of the person who would otherwise be entitled to it, (3) during that
law 1921 and that the court should look to the mandolin's case to
determine the actual consideration and intention of the parties.
Paulsen v. Hamm, 1 Ill. 3d, 12 ff.ff. to this point.

The facts in this case are not at all similar to those
which appear in the Paulsen case. It was there proven that the
form of release was given only for a specific purpose and in favor
of a particular [illegible], the purpose being to give a holder of a
certain mortgage priority.

In Torrie v. Kennedy, 208 Ill. 384, the courts stated
that in instances that which have no immediate right, that clearly
substantial, limit the operation of a general waiver, that the
courts are reading in the release to mean a monetary transfer, the
court would enforce the waiver as agreed upon by the parties.

All the circumstances here indicate the intention of the parties that the waivers should be full and unconditional. At any rate, as against the trustee and owner, complainant is estopped by his representation that he was waiving for the full amount up to the respective times the waivers were given.

Moreover, in the recent case of R. G. Wolff Co. v. Gwynne, 246 Ill. App. 36, it was decided that an unconditional waiver of lien could not be repudiated upon the ground of want of consideration. If such a waiver may not be repudiated upon the ground of total failure of consideration, it would seem to follow that such waiver cannot be overcome by reason of a partial failure of the consideration such as is urged.

Indeed, on the facts here appearing it is not necessary for us to go so far as did the court there. That decision is to the effect that a waiver of a mechanic's lien under seal cannot be repudiated for want of consideration. Here, the payments from the trustee bank were a sufficient consideration. Since it appears the payments were obtained through the presentation of the waivers, complainant, we think, is clearly estopped to question the validity of the waivers through the presentation of which money was obtained from the trustee bank which was neither owner, nor party to the contract under which complainant claims.

Nor are we able to find, as complainant insists we should, that the finding that uncompleted work on April 24, 1925, was of the value of about $1,000, is against the clear preponderance of the evidence. The testimony is at least conflicting (Barney v. Barney, 56 Ill. App. 295), and, moreover, complainant did not object to the finding before the master and therefore can not raise the question here. (Jewel v. Rock River Paper Co., 161 Ill. 57.)

It is also urged that the waivers did not release the lien given by the statute on the money due and to become due to Schroter under his contract with the owner. The record, however, shows that complainant gave no notice of his claim for lien until August 12, 1925. The finding of the master and the finding of the decree, which cannot be questioned here for the reasons already explained, are to the effect that defendants did not have knowledge of the contract between complainant and Schroter prior to the service of notice and at the time the notice was served Schroter had abandoned his contract. Prior to the service of this notice defendants had a right to rely on the affidavit of the contractor. Knickerbocker Ice Co. v. Halsey Bros., 262 Ill. 241; Berkshire Warehouse Co. v. Hilger, 268 Ill. 463. Section 21 of the Mechanicds Lien act undoubtedly gives to a subcontractor, as against the creditors, assignees and personal and legal representatives of the contractor, a lien upon moneys or other considerations due or to become due from the owner under the original contract. North Side Sash & Door Co. v. Goldstein, 210 Ill. App. 226. The same section, however, also provides:

> "In no case, except as hereinafter provided, shall the owner be compelled to pay a greater sum for or on account of the completion of such house, building or other improvement than the price or sum stipulated in said original contract or agreement, unless payment be made to the contractor or to his order, in violation of the rights and interests of the persons intended to be benefited by this act."

A similar provision in the act of 1869 was construed by the Supreme court in Biggs v. Clapp, 74 Ill. 339. The court there said that it was "evident the frumers of the act never contemplated that the owner should be required to pay a single dollar to a subcontractor when he had exhausted the original contract price in the completion of the building." In Hansen v. Muldoon, 210 Ill. App. 513, the Appellate court for the second district, construing this section, held:

It is also urged that the minors in not letting the lien lapse, by the statute on the money the so-called [illegible] Corporation under his contract with Mr. Wright. [illegible] above that everything done on behalf of Mr. Wright by the [illegible] August 12, 1920. The testimony of the witnesses and the [illegible] Barnes, which tended to establish that the work [illegible] explained, and to the effect that [illegible] of the contract [illegible] view of having not a lien [illegible] abandoned his contract. [illegible] Pacific and a right to rely on the [illegible] Independence Co. v. Allen Co., 94 Ala. 581; Independence Co. v. Clark, 94 Ala. 600. [illegible] lien was independently given to a subcontractor, to secure the [illegible] tors, employees and persons who have furnished [illegible] Brewer, a lien upon money or other consideration due or to become due from the owner under the original contract. [illegible] Bank v. Dyer Co. v. Grimsley, 94 Ala. 600. [illegible] however, also provides:

> "In no case, except as hereinafter provided, shall the owner be compelled to pay a greater sum than he at the commencement of the operation of any lien, notices or other proceedings under the terms or sum stipulated in such original contract or contracts, unless prevented by acts of the contractor or the contractor's relations or the rights and liabilities of the parties shall be modified by this act."

A similar provision in the law of 1920 was interpreted by the Supreme Court in Blake v. Glass, 21 Ala. 24. The point there was if the failure to give notice of an over payment should have the effect of making it not a lien. Glass had a lien contractor was in the employ of the owner, Glass, the contractor of the building." In Lumber Co. v. Dunlap, 24 Ala. 24, the English court in an same matter, concerning the section, said:

"Where a building contractor abandons the contract, but completes the building under an arrangement with the owner, the latter has the right to use any money that remains in his hands, which would have been due and payable to the contractor had he completed the contract, for the purpose of finishing the job, and a subcontractor under the original contract can only acquire a lien to reach the balance that remains in the hands of the owner after paying what is necessary to expend in completing the job according to the contract."

In this case the court decreed a lien in favor of the complainant for this amount.

It is also urged that the court erred in distributing the costs among the parties. Defendants Grosby and the trustee at all times conceded to the complainant a lien for $1,[illegible]. We therefore think the court did not err in apportioning the costs. Walsh v. North American Cold Storage Co., 26[illegible] Ill. 322; Kaplan v. Stein, 329 Ill. 253.

For the reasons indicated the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

32954

GREGORY T. VAN METER, Administrator of the Estate of MICHAEL VANDA, alias WANDA,
Appellee,

vs.

PERE MARQUETTE RAILROAD COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

252 I.A. 646[3]

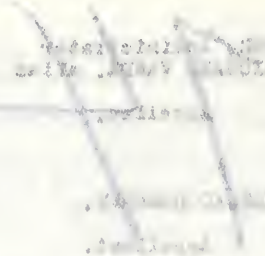
MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This suit is by the administrator in tort for alleged negligence resulting in the death of his intestate. At the close of plaintiff's evidence and afterwards at the close of all the evidence, defendant moved for an instructed verdict in its favor, which motions were denied; the jury returned a verdict for the plaintiff in the sum of $5,000 and the court, over-ruling motions of defendant for a new trial and in arrest, entered judgment upon the verdict.

On October 4, 1923, the deceased while walking across defendant's tracks was struck by one of its trains and instantly killed. The accident occurred at or near the intersection of West 49th and South Leavitt streets in Chicago.

The cause was tried upon three counts which, in varied phrase, alleged negligence in the management and operation of defendant's train, in defendant's failure to maintain a lookout and in defendant's failure to give proper warning.

The defendant contends here that the proof fails to show that the intestate at the time of his injury was in the exercise of due care. It is urged that the verdict is against the manifest weight of the evidence and further that the motion for a directed verdict should have been granted because the deceased at the time of his injury was a trespasser on defendant's right



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Mr. Darlow actually evaluated the evidence on the spot.

This was in or the acceleration to date for illegal negligence resulting in the death of his subordinate. At the close of plaintiff's evidence and defendants at the close of all the evidence, defendant moved for an instructed verdict in its favor, which motions were denied; the jury returned a verdict for the plaintiff in the sum of $3,500 and the court, overruling motions of defendant for a new trial and in arrest, entered judgment upon the verdict.

On October 6, 1978, the Lowrence motor vehicle accident defendant's truck was struck by one of the trucks and vehicle killed. The accident occurred at at that the intersection of West 12th and South streets in Gulfport.

The case was tried upon three theories, in varied forms, alleged negligence in the maintenance and operation of defendant's truck, in defendant's failure to maintain a lookout and in defendant's failure to give proper signals.

The defendant contends that the jury's finding is some that the accident at the time of his injury was in the exercise of due care. It is urged that the evidence in support the contrary weight of the evidence and because instructions in a directed verdict should have been granted because the deceased at the time of his injury was a trespasser on defendant's right

of way. A description of the situation at the time and place of the accident becomes necessary.

Forty-ninth street is a public highway in the city of Chicago extending east and west; at this time it was unpaved. Its exact width is not disclosed by the evidence. Apparently about the middle of the street was a walk about 15 feet wide constructed of planks. South Leavitt street is a public highway extending north and south, intersecting 49th street; at this intersection 49th street is crossed by two tracks of defendant's railroad which extend in a general northerly and southerly direction, curving to the east about 100 feet south of 49th street. Two tracks of the Pennsylvania railroad also cross 49th street at this intersection. At the northeast corner of the intersection was a tower in which a watchman was located, who, by the use of 78 different levers, operated signals which gave notice of the approach of trains. Southwest of 49th street was a shanty occupied by a flagman who was accustomed to perform the usual duties belonging to such a position. As a matter of fact, there were two flagmen who relieved each other of these duties at fixed times. South of 49th street about 20 feet from the planking was a dirt elevation extending east and west. A bridge extending east and west crossed the viaduct south of 49th street, and the tracks of the Grand Trunk railway ran over this bridge above the viaduct, under which defendant's trains approached the crossing from the south. The bridge was supported by posts which were close together and alongside the crossing. The approach to the crossing from the west on 49th street was also under a viaduct over which trains ran. The track over this viaduct ran northeast and southwest. Between the tracks of the defendant railroad and under the viaduct by which the trains approached from the south was an abutment about 40 feet long which obstructed the view of the engineer. As one approached the crossing

of way. A description of the situation at the time [illegible] all the parties' [illegible] knowledge.

Forty-first street is a public highway in the city of Calumet extending east and west; at this time it was unpaved. Its exact width is not disclosed by the evidence. Apparently about the middle of the [illegible] there is [illegible] of planks. [illegible] street is a public highway extending north and south, intersecting 41st street; at this intersection 41st street is crossed by the tracks of [illegible] railroad which extend in a general northerly and southerly direction, running to the east about 150 feet along [illegible] street. Two tracks of the Pennsylvania railroad also cross this street at this intersection. At the northwest corner of the intersection was a tower in which a watchman was located, who, by means of 72 case
different levers, operated signals which gave notice of the approach of trains. Southwest of this tower was a shanty occupied by a flagman who was stationed to [illegible] the [illegible] ing to warn a pedestrian. As a matter of fact, there were two flagmen who relieved each other of these duties by [illegible] shifts. [illegible] of 41st street, about 50 feet from the crossing was a dirt driveway extending east and west. A bridge which [illegible] and [illegible] the viaduct south of 41st street, and the tracks of the [illegible] railway ran over this bridge along the viaduct, where [illegible] bridge approached the crossing from the south. The bridge was supported by posts which were large and [illegible] the crossing. The approach to the crossing from the [illegible] street was under a viaduct over which [illegible]. The train over this viaduct ran [illegible]. Between the tracks of the [illegible] railroad and under the viaduct by which the engine approached from the south was an obstruction about 40 feet long which obstructed the view of the engineer. It was contended the existing

on 49th street from the west, the first or south point of defendant's tracks was about 10 or 15 feet east of the trestlework under which pedestrians passed. The distance between the north and south bound tracks was about 11 feet. Eight photographs representing the crossing from different points of view are in the record by agreement of the parties, but accurate measurements which would be much more useful in getting at the actual physical situation, are lacking.

On the east side of the crossing were two signposts, on one of which werepainted the words, "Two Railroad Crossings Danger," and on the other the word "Stop" in large letters. Telegraph poles and wires were placed along the south side of the street.

There is conflict in the evidence as to whether an approaching train could be seen at a distance by a pedestrian walking east on 49th street, but the description we have given indicates that the sign which warned of danger spoke the truth. The presence of the watchman in the tower and the flagman in the county are also significant facts tending to show that everyone realized the danger of the situation.

The deceased lived at 5253 South Campbell avenue, southwest of the crossing; he was a native of Czecho Slovakia, and had been in the United States a little over a year; his family still resided in his native country. He was employed at the City Car Company plant located at 47th street and Boyne avenue, northeast of the intersection where the accident occurred; he lived with a fellow countryman named Dorkut, and they were employed by the same company. On the morning of October 4, 1923, Dorkut and deceased were on their way to work; they arrived at this intersection a few minutes before seven o'clock a. m.; it was a foggy morning; trains of cars were passing over the bridge on the elevation south of 49th street. While deceased and his companion were crossing the track

on 40th street from the west, the light on south point of Jefferson's tracks was about 12 or 15 feet east of the trestle-work under which pedestrians passed. The distance between the north and south track was about 12 feet. Some photographs representing the crossing from different points of view are in the record by agreement of the parties, but enlarged photographs which would be much more useful in getting at the actual physical situation, are lacking.

On the east side of the crossing were two signposts, on one of which were painted the words, "Railroad Crossing Danger," and on the other the word "Stop" in large letters. Telegraph poles and wires were placed along the south side of the street.

There is conflict in the evidence as to whether an approaching train could be seen at a distance by a pedestrian walking east on 40th street, but the testimony we have given indicates that the sign which warned of danger spoke the truth. The presence of the watchman in the tower [illegible] was also significant facts tending to show that everyone realized the danger of the situation.

The plaintiff lived at [illegible] North [illegible] Avenue, southwest of the crossing; he had lived in the locality [illegible], and had been in the United States a little over a year; his family still resided in his native country. He was employed at the [illegible] Gas Company plant located at 27th street and [illegible] street, northwest of the intersection where the accident happened. He lived with a fellow countryman named [illegible], and they were employed by the same company. On the morning of October 4, 1926, [illegible] and [illegible] were on their way to work, they arrived at this intersection a few minutes before seven o'clock a.m.; it was a clear morning; trains of [illegible] were passing over the bridge on the street north of 40th street. While [illegible] and [illegible] were crossing the track

defendant's train of 11 cars approached the crossing at a speed of 15 to 20 miles an hour upon the northbound track. The west side cylinder of the engine struck the deceased and he received the injuries from which he died on the same day.

As the train approached the crossing the engineer and the fireman sat on the seat box, the engineer on the right side and the fireman on the left; the engineer could not see a person on the west side of the track; he testified the bell was ringing continuously as the train approached the crossing, but that the only whistle given was when the train was 35 or 40 feet south of the viaduct; he could not say whether the flagman was there or not.

The fireman testified that if a man was on the west side of the track he could have seen him. Part of his work as fireman was to keep a lookout ahead as they crossed the streets. Before this train came to the viaduct he was not looking ahead because he was looking up at the Grand Trunk train. Under the viaduct he could not see ahead of the train on account of the abutment. At the coroner's inquest he testified that he was "looking up at the Grand Trunk and I looked down just in time to see him fall."

Ryba, the flagman, testified that he was there and that when the train came by he was right in the middle of the street flagging; however, he did not see deceased before he was hit. He worked for the B. & O. and his time to quit was at 6:30 a. m., which was before the accident happened. He said he stood there and waited for the man who was to relieve him; he said that he did not see the deceased because he did not get time to look on the south - "it is a dangerous hole there."

Under the facts as above set forth, we think the question of whether defendant was negligent as alleged in the three

counts was for the jury. The jury has returned its verdict for the plaintiff and the verdict has been approved by the court. We cannot say that there is no evidence on which a verdict of negligence could reasonably be returned or that the verdict is so manifestly against the evidence as to require it to be set aside.

A more serious question is raised by the contention of defendant that deceased was a trespasser on defendant's right of way at the time he was killed. As we have already recited, Dorkut, a fellow workman, was walking with deceased; he testified that the accident happened "right in 49th street, right where that bridge crosses these tracks." Dorkut also said that the deceased was "thrown in the switch tracks and was lying towards 47th street right where that sidewalk would be on the north side of the street."

Lazo, a fellow workman of deceased, said that after the accident he saw the body of Vanda lying on the crossing. "The first time I saw Mike Vanda that morning he was lying there in the street, right there in the crossing, one foot across one track and the head the other way." On cross-examination Lazo said that Vanda's body lay right there in the crossing, one leg on the rail and head the other way. The witness was shown a picture of the situation, plaintiff's exhibit 7, and he marked the end of the planking as the place where the body lay.

Maly, the man in the tower, said that when he saw the deceased he was about 15 feet south of 49th street and that he was about 15 or 20 feet south of 49th street when he was hit; that the planking was about 20 feet from the viaduct; that he, the witness, just glanced out of the window as he did his work and saw two men walking east across the tracks; that it was about five feet from the trestle to the place where the man was hit - his estimate is not more than ten feet; that the viaduct was about 40 feet from north to south and that he didn't know whether 49th street was

just as wide as the planking.

The engineer testified that the body of Vanda lay "almost five or six feet south of the crossing place west of the tracks;" that when the train was stopped it was a car length north of the crossing and the injured man was about a car length behind south of 49th street. The fireman estimated the body was about ten feet south of the planking. The conductor said the body was almost six or eight feet south of the planking under the viaduct. The brakeman said that the body was eight or ten feet south of the crossing planking. The baggageman said that the body was just south of 49th street. The flagman on the train said that it was six to eight feet south of the crossing, but on cross-examination explained that he meant south of the planking.

These distances are only estimated. The plaintiff presented prima facie proof sufficient to show that the deceased was struck while in the crossing. Exact measurements are not produced although easily available, and none of the witnesses claims to know the exact width of 49th street at this place. It is the theory of the defendant that the deceased and his companion walked across a prairie to the right of way of the defendant south of the viaduct, through which the train approached; that they then walked north on the right of way in the direction of 49th street, turning to the east before they reached the street, and that the deceased was struck while still walking upon defendant's right of way. If this was an undisputed fact, a peremptory instruction for the defendant should have been given, because there was no count which charged, nor evidence which tended to show, that the injury deceased received was wantonly inflicted. There was a conflict in the evidence. This question was also for the jury, and we think the jury could reasonably find from the evidence that the injury occurred in the public street.

[illegible] on which he was standing.

The defendant testified that he was in front of the "Almost like or was just ahead of the crossing when heard the train;" that when the train was almost [illegible] of the crossing and he looked and saw that there was a car coming within about of 40 feet. The [illegible] testified that he had not seen the car approaching. The conductor said that the car was almost six or seven car lengths of the crossing when the train struck the automobile and that the car was still moving when the train crossing. The conductor said that the car was [illegible] about of 40 miles. The figures on the trains speed meter is was also to which fact said if the [illegible] that he [illegible] [illegible] testimony that the speed meter of the [illegible].

There is evidence to the contrary. The plaintiff presented other facts which tended to show that the accident was caused solely by the negligence. Their witnesses are not positive although usually positively, and some of the witnesses claims to know the speed within of 40 miles of the train. It is the theory of the defendant that the accident was caused by walking across a parallel to the right of way of the railroad south of the station, through which the train approached. They then walked north on the right of way in the direction of the train, turning to the east before they crossed the track. At that the deceased was struck while still walking [illegible] of way. If this was the situation then, a [illegible] for the defendant would have [illegible], because there was no [illegible] duty, the [illegible] injury. There was a [illegible] fact in the evidence. This question was also for the jury, and we hold the jury could reasonably find from the evidence that the injury occurred in the public street.

Defendant contends, however, (and this is the controlling question in the case) that the intestate was guilty of contributory negligence. It is argued (assuming that Vanda was not a trespasser and that he approached the crossing from the diagonal viaduct) that necessarily in such case he would reach the southbound track of defendant before coming to the northbound track - a distance of about 22 feet. It is urged that he therefore had an unobstructed view of the approaching train for a long distance, and it is argued that the clear inference is either that deceased did not look and therefore did not see or that he did look and seeing disregarded the approach of defendant's train, and that in either case he was guilty of negligence. The evidence is in conflict as to whether the view was unobstructed whether deceased approached the crossing from the one direction or the other.

There is no doubt of the general rule which obtains in this state with reference to the duty of persons approaching a railroad crossing. It is a place of known danger and one who is about to cross must exercise that degree of care which an ordinarily prudent person would exercise to avoid injury. Due care will ordinarily require that the person about to cross use all his faculties. Ordinarily he must stop, look and listen when danger is made apparent. The cases are collected in Burns v. C. & A. R. Co., 223 Ill. App. 439, and it is not necessary to repeat that review of the cases. The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see a train when the view was unobstructed. Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154.

However, where the evidence is conflicting and reasonable minds might differ as to the inferences necessarily drawn therefrom, the question is always for the jury. The law does not require an injured party to exercise before an accident a degree of

Defendant contends, however, (and this is the controlling question in the case) that the intervening [illegible] intervening negligence. It is argued (correctly that [illegible] was not a transgressor and that he contributed the operating [illegible] violation) that necessarily in such cases as would [illegible] the existence of telephone poles [illegible] the [illegible] of about 30 feet. It is urged that [illegible] view of the approaching train for a long distance, but it is [illegible] that the driver intended to either [illegible] or [illegible] the approach of [illegible] train, and that it [illegible] quality of negligence. The evidence in [illegible] the view was unobstructed [illegible] the crossing from the direction of the [illegible].

There is no doubt of the general rule [illegible] this state with reference to the duty of drivers approaching a railroad crossing. It is a place of known danger and it is [illegible] to cross must exercise that degree of care which an [illegible] person would exercise to avoid injury. The [illegible] requires that the person about to cross see all the [illegible]. Ordinarily he must stop, look and listen [illegible]. The cases are collected in [illegible] 139, and it is not necessary to repeat such review [illegible]. The law will not tolerate the [illegible] of allowing a person to testify that he looked but did not see a train that [illegible] unobstructed. [illegible], 121. 181.

However, where the evidence is conflicting and reasonable minds differ as to the inferences [illegible] interfere, the question is always for the jury. [illegible] requires an injured party to exercise before he [illegible] a degree of

care which a judge may think proper after he has heard all the evidence about the accident. Overend & Gurney Co. v. Gibb, L. R. 5, H. L. 494.

When the evidence must be weighed, it is for the jury. Austin, Admr., v. Public Service Co., 299 Ill. 119. Where reasonable minds would not agree to the contrary, the question is for the jury. Petro, Admx. v. Hines, 299 Ill. 236. Failure to look and listen is not negligence per se. Dukeman v. C.C.C. & St. L. R.R.Co., 237 Ill. 104. The only requirement of the law is that the conduct of a person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. It cannot be said as a matter of law that the failure of a person to look or listen constitutes negligence or lack of due care. Winn v. C.C.C. & St. L. Ry. Co., 239 Ill. 132. Nor under some circumstances will a failure to look twice in the same direction amount to contributory negligence as a matter of law. Ordinary care cannot be arbitrarily defined. Chesapeake & O. Ry. Co. v. Weld, 25 Fed. (2nd Ser.) 360.

The defendant, however, relies on Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, cited by this court in the recent case of Goodman v. Chicago & N. I. R. Co., 248 Ill. App. 128. That was a case where the driver of an automobile drove across defendant's tracks and was killed. After stating the facts this court said:

> "From the foregoing statement of facts, it cannot reasonably be controverted that plaintiff continuously for, at least, the space of 100 feet along Main street east of the track had a clear and unobstructed view for such a distance south along the track that the slightest look in that direction would have revealed the approaching train in time for him to have avoided the accident."

The court held that the plaintiff was guilty of negligence as a matter of law, citing Baltimore & O. R. Co. v. Goodman, supra, and quoting the statement of Mr. Justice Holmes in that case that if a driver could not otherwise be sure whether a train was dangerously near, it was his duty to stop and get out of his vehicle, although

case which a judge may think proper after he has heard all the evidence. Pierce v. Pierce, [illegible] S. W. 2d.

Now the evidence that he relied, if any, on the jury. Martin, Adm., v. Public Service Co., [illegible] Mo. 111. [illegible] minds would not agree as to the certainty, the inquiry is for the jury. Deere, Adm., v. Kline, 295 Ill. 490. Failure to look and listen is not negligence per se. Pennsylvania R. R. Co. v. [illegible], 87 Ill. 104. The duty requirement of the law is that the conduct of a person involved shall be consistent with the exercise of ordinary prudence would do under like circumstances. It cannot be said as a matter of law that the failure of a person to look or listen constitutes negligence or lack of due care. Kinn v. C. C. C. & St. L., 78 Ill. 132. For under such circumstances one will a person is less prone to the same direction expect to encounter conditions in a matter of law. Contributory care cannot be arbitrarily fixed. Chicago [illegible] Ry. Co. v. Tuck, 77 Ind. (and Ser.) 499.

The defendant, however, relies on Baltimore & O. Co. v. Goodman, 275 U. S. 66, given by this court in the recent case of Gorham v. Chicago & A. R. R., 231 Ill. App. 126. This was a case where the driver of an automobile there moved forward at a strange and not crossing. After crossing the track the car moved well.

> "From the foregoing statement of facts, it cannot reasonably be contended that plaintiff contributorily was, at least, the cause of his fatal injury when the train hit the truck had a clear and unobstructed view for more than a mile and the train which the plaintiff knew it was approaching could have received the warning from the approaching train in time for it to have avoided the accident."

The court held that the minority rule is controlling as a matter of law, citing Baltimore & O. Co. v. Goodman, supra, and quoting the statement of Mr. Justice Holmes in that case that if a driver could not discover the fact whether a train was approaching near, it was his duty to stop and get out of his vehicle, although

obviously he would not often be required to do more than stop and look; that if he relied upon not hearing the train and not hearing a signal and took no further precaution, he did so at his own risk. There was a finding of fact by this court that plaintiff was guilty of negligence. Mr. Justice O'Connor, specially concurring, stated that in his opinion the rule laid down in Baltimore & O. R. Co. v. Goodman, went too far and was not in accord with the law of the state. He stated that as he understood that case, the rule laid down would bar recovery in every case as a matter of law where the contributory negligence of the injured or deceased person was a defense, and that he conceived the true rule to be as laid down in Flannelly v. Delaware & Hudson Co., 225 U. S. 597. A petition for certiorari was filed in the Supreme court and denied. In the later case of Greenwall v. Baltimore & O. R. R. Co., Gen. No. 32708, opinion filed May 15, 1928, not yet reported, this court affirmed the judgment of the trial court in favor of the defendant entered upon an instructed verdict. This case was one where the plaintiff brought an action to recover damages sustained on account of his automobile truck being struck by one of defendant's trains at a street crossing in Chicago. The opinion of this court by Mr. Justice O'Connor states:

> "In view of the holding of this court in the recent case of Goodman v. Chicago & A. Ry. Co., 248 Ill. App. 123, we think that the action of the trial court in directing a verdict must be sustained. In that case we approved of the holding of the Supreme court of the United States in Baltimore & O. R. Co. v. Goodman, U. S. 72 L. Ed. 48 Sup. Ct. 24, where it was held in substance that where a person attempts to cross a railroad track in the daytime and is struck and injured, no recovery can be had because plaintiff in such case is guilty of negligence as a matter of law. In the instant case plaintiff's truck was being driven across the defendant's railroad tracks in the daytime, and he was therefore under the existing circumstances, guilty of negligence as a matter of law and cannot recover."

A petition for a certificate of importance was granted and the Supreme court affirmed the judgment of the trial court in Greenwald v. B. & O. R. R. Co., 332 Ill. 627. The court in its opinion said in substance that one crossing a railroad track must approach it

obviously he would not either be required. It is true that stop and look; that if he relied upon not hearing the train and upon the absence of a signal and took no further precaution, he did so at his own risk. There was a finding of fact by this court that plaintiff was guilty of negligence. Mr. Justice O'Connor, specially concurring, stated that in his opinion the rule laid down in Baltimore & O. R. Co. v. Goodman, went too far and was not in accord with the law of the state. He stated that as he understood that case, the rule laid down would not necessarily in every case as a matter of law charge the contributory negligence of the injured or deceased person was a question, and that he considered the true rule to be as laid down in Pokora v. Wabash Railway Co., 292 U. S. 98. A petition for certiorari was filed in the Supreme court and denied. In the later case of Greenwald v. Baltimore & O. R. R. Co., Gen. No. [illegible], opinion filed May 14, 1943, not yet reported, this court affirmed the judgment of the trial court in favor of the defendant entered upon an instructed verdict. This case was one where the plaintiff brought an action to recover damages sustained by reason of his automobile truck being struck by one of defendant's trains at a street crossing in [illegible]. The opinion of this court by Mr. Justice [illegible] stated:

> "In view of the holdings of this court in the recent case of Sherman v. Chicago, B. & Q. R. Co., [illegible] Ill. App. [illegible], we think that the action of the trial court in directing a verdict must be sustained. In that case we commented on the holding of the Supreme Court of the United States in Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, 48 Sup. Ct. 24, where it was held in substance that where a person attempts to cross a railroad track at grade [illegible] stop and look and listen, and [illegible] the plaintiff in that case [illegible] of law. In the present case [illegible] the defendant's [illegible] under the existing circumstances, guilty of negligence as a matter of law as [illegible]."

A petition for a certificate of importance was granted and the Supreme court affirmed the judgment of the trial court in Greenwald v. B. & O. R. R. Co., [illegible] Ill. [illegible]. The court in its opinion said in substance that one crossing a railroad track must approach it

with care commensurate with the known danger, and in driving a vehicle upon a track he must use due care to look in the direction from which an approaching train might be coming; that if he had an unobstructed view he could not rightfully assume that a bell might be rung or a whistle sounded, and further, that the question of due care was for the jury when there was any evidence which, with legitimate inferences that might be justifiably drawn therefrom, would tend to show the exercise of due care; but where the evidence did not tend to so show the trial court was justified in instructing the jury to return a verdict for the defendant. The court said:

> "The rule has long been settled in this State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence."

The court further said:

> "Appellant complains that the Appellate court cited as controlling authority the case of Baltimore and Ohio Railroad Co. v. Goodman, 48 Sup. Ct. 24, and other cases, as binding in this case, and argues that such cases do not state the rule obtaining in this State. This court reviews the judgment of the Appellate court and not the reasons given therefor, and under the rule in this State, as hereinbefore stated, we are convinced that appellant's evidence does not show due care on the part of his servants in crossing the tracks. The Superior court therefore did not err in instructing the jury to return a verdict for the defendant and the Appellate court did not err in affirming that judgment."

A majority of this court in the Goodman case (at least this is true of the writer of this opinion) did not understand the opinion to lay down the extreme rule of law as set forth by Mr. Justice O'Connor in the dissenting opinion there filed, nor understand that in citing the opinion of Mr. Justice Holmes with approval, we were laying down a rule of law inconsistent with the rule as announced in previous decisions of the Supreme court of this state. On the contrary, we considered that opinion consistent

with the rule as announced by the highest court of this state and as laid down in the decisions of that court, which we have heretofore cited. Most of the cases to which reference is made disclose facts showing a driver of a vehicle of some kind entering upon a crossing. The danger of injury in such cases is too obvious to require description. It is perfectly apparent, we think, that one driving a vehicle might well hesitate to cross under circumstances where a pedestrian might in the exercise of ordinary care proceed to do so; and the specific question to be decided here is whether, under all the circumstances appearing in the evidence, reasonable men might differ as to whether Vanda would in the exercise of ordinary care have proceeded across the track at the time he was injured. All the facts and circumstances must be considered. The absence of the flagman from his post of duty (a matter which we have already said to be for the determination of the jury), the condition of the weather at the time in question, the rapidity with which the train moved, the fact that trains might possibly be approaching over several tracks from different directions, and the fact that for a part of the time at least, whether he approached the crossing from the south or the north, his view of an approaching train was obscured, if not at times impossible, - all these, as well as other circumstances which might be pointed out, disclose a case in which we think reasonable men might well differ as to whether the evidence tends to show that the intestate was in the exercise of ordinary care. The question being for the jury and its judgment having been taken and found favorable to the plaintiff, we cannot say either that there is no evidence tending to sustain the verdict or that it is so clearly and manifestly against the preponderance of the evidence that we would be justified in setting the judgment aside. We recognize the case is exceedingly close, but upon the whole record we decide that the judgment must be affirmed.

AFFIRMED.

O'Connor, P. J., concurs.
McSurely, J., dissents.

33033

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN P. KIELY, Plaintiff in Error,

vs.

THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, a Municipal Corporation, Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

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252 I.A. 646

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

On May 16, 1924, relator, John P. Kiely, held the position of chief clerk, grade 7, in the Bureau of Finance of the defendant Board of Education in the city of Chicago. He entered the service of the Board by taking a competitive examination held by the provisions of the Civil Service act on July 21, 1902, and remained continuously in the service of the Board, being promoted from time to time until he attained this position.

On June 23, 1924, he was suspended. On July 22nd thereafter he was notified that written charges had been preferred against him. A committee of the Board of Education was designated to hear the evidence and report. Relator was given due notice, appeared at the trial personally and by counsel and offered evidence in his own behalf. The committee reported, finding the relator guilty and recommending his discharge, and the Board of Education, with only one dissenting vote, sustained the finding of guilt and ordered his discharge.

The relator filed a petition for a writ of certiorari to review the order in the Superior court of Cook county, and the writ issued as prayed on December 30, 1926. It was made returnable February 27, 1927. The Board of Education made return of the record, and a transcript of the evidence taken by the committee upon the hearing was returned as a part of the record. The Superior court, upon consideration of this record, entered an order that

the writ be quashed. The relator by this writ of error seeks to reverse that order.

The accusation against the relator was made in writing by the business manager of the board of education to the president. It states:

> "I hereby prefer charges of conduct unbecoming an employe of the Board of Education, against Mr. John P. Kiely, Chief Clerk, Bureau of Finance, and Mr. Robert E. McNamara, Engineer-Custodian of the Willard School, and recommend that they be suspended from their positions pending a hearing of the aforesaid charges."

At relator's request a bill of particulars was filed and he was granted a hearing separate from McNamara. McNamara confessed the charges and testified against relator.

The law applicable to a proceeding of this kind is fully set forth in Funkhouser v. Coffin, 301 Ill. 257. Evidence is not heard. The trial is upon the record only. The judgment rendered is either that the writ be quashed or that the record of the proceedings be quashed. The Supreme court in that case also said:

> "There is no presumption in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intendment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record. *** 'and the record must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order.'"

The finding that the accused is guilty is a mere conclusion of law, if it states no fact by which the court may see that the conclusion is true. The Supreme court further said in that case, following Troxell v. Dick, 216 Ill. 98:

> "A quasi judicial tribunal of inferior jurisdiction must recite the facts, or preserve the facts themselves, upon which its jurisdiction depends."

We further quote the words of the court:

> "The holdings of this court are that the return to a common law writ of certiorari must show by affirmative evidence the jurisdiction of the tribunal passing upon a case removing a

the suit be granted. The criterion by this suit of which tends to

restrain that order.

The examination against the relator was made in writing

by the business manager of the Board of Commissioners of the Jewelry;

it states:

"I hereby state charges of unfair methods in violation
of the laws of Illinois, against Mr. John S. Klein, Jewel
Clerk, Bureau of Illinois, and Mr. Robert E. Hermann, Inspec-
tor of the Illinois Board, and recommend they be
suspended from their positions pending a hearing of the afore-
said charges."

At relator's request a bill of particulars was filed;

and he was granted a speedy separate trial therefor. Hermann

contested the charges and initiated against relator.

The law applicable to a proceeding of this kind is

fully set forth in Thompson v. Smith, 154 Ill. 497. Evidence

is not heard. The order is sent for review only. The Supreme

Court is either that the evidence was sufficient to support the

the preliminary [illegible]. The Supreme Court in that case wrote

said:

"There is no requirement in favor of a body exercising a
limited or statutory jurisdiction. Nothing is done in intend-
ment in favor of such jurisdiction; but facts must appear upon
jurisdiction is founded must appear. In the record, it must be
record must show that the board acted upon evidence and contain
the testimony upon which the decision was based, or at least that
the court may determine whether there was evidence tending
tending to support the order."

The finding, that the evidence is quite in a matter con-

clusion of law, it is stated as fact by which our courts can see

that the conclusion is true. The Supreme Court further said in

that case, following Cassell v. Kirk, 48 Ill. 53:

"A mere judicial finding of inferior jurisdiction must
recite the facts, or preserve the legal conclusion, upon which
its jurisdiction depends."

Further

Quote the words of the court:

"The holding of this court was that the relator is a person
law will of competent such when by sufficiently evidence the
jurisdiction of the tribunal possible upon a case requiring a

person from office, and must show by the facts recited that the tribunal so acting had jurisdiction and authority so to do."

In the recent case of Murphy v. Houston et al., 250 Ill. App. 385, this court said:

"The record of the proceedings of the commission appears from the return made and it may or may not include the evidence taken. It may, in lieu of the evidence, return such findings as will affirmatively establish its jurisdiction to make the order reviewed, but when, as here, the commission returns specific findings and also the evidence, the reviewing court may examine both, not for the purpose of weighing the evidence upon any material issue of fact, but in order to determine (1) whether the commission had jurisdiction; (2) whether it exceeded its jurisdiction; (3) whether there was any evidence tending to prove the charges made; and (4) whether the proceeding was conducted according to or in violation of the law."

The report of the committee made a general finding that Kiely was guilty of the charges (1) "in that" he "inefficiently managed the affairs and improperly performed the duties of the position which he occupied, and because of his failure to maintain proper supervision of the payrolls *** a practice arose of padding said payrolls whereby the Board of Education of the City of Chicago was defrauded;" (2) in "that, to-wit, *** and while he was in practical charge of the assignments and appointments of substitute engineer-custodians, ** improperly discriminated in favor of certain persons in the matter of such assignments and appointments, so that it became and was a matter of common report among engineer-custodians and their assistants that assignments and promotions in the engineering service were not made on merit but as a matter of favoritism from the said John P. Kiely, and that during the period of time commencing with the year 1919 and continuing up to and including the year 1924, one Robert E. McNamara, an engineer-custodian in the employ of the Board of Education of the City of Chicago and to whom the said John P. Kiely was indebted because of an unsecured loan of $500 made on or about October 18, 1920, by the said Robert E. McNamara to the said John P. Kiely and $250 of which remained unpaid up to the time of the investigation which resulted in the

filing of the aforesaid charges, who also represented himself to be an intimate friend of the said John P. Kiely, collected sums of money from various persons desirous of promotion or appointment, advising them that he made such collections in order to present the same to the said John P. Kiely, and that the said John P. Kiely did in fact, during the period of time commencing with the year 1912 and continuing up to and including the year 1924, receive certain small sums of money from persons who were desirous of being favored in the matter of appointments or promotions to positions as engineer-custodians and substitute engineer-custodians in the service of the Board of Education of the City of Chicago, and that as a result of payments of such character, the said John P. Kiely did improperly discriminate in favor of certain individuals in connection with appointments and promotions as engineer-custodians and substitute engineer-custodians in the service of the Board of Education of the City of Chicago."

As we understand the relator's position, it is not contended that the Board of Education was without jurisdiction in this matter, or that it exceeded its jurisdiction, or that any of the forms of law were disregarded in the proceeding. Neither is there any contention that there is no evidence in the record from which a finding of unbecoming conduct could be reasonably inferred, but relator's contention is that as the Board of Education has fixed by its finding the factors constituting cause, this court cannot say that another cause or one or more causes less than all would be sufficient because it would thereby substitute its own judgment for that of the Board of Education; that the finding that relator was guilty of unbecoming conduct only states a conclusion; that the Board by its finding of facts has defined for itself and for this court that which must be held unbecoming conduct, and that this unbecoming conduct consists, not of any one or of any number less than

filing of the aforesaid charges, and also representations should be on behalf of the said John T. Kelly, solicited some of money from various persons desirous of procuring or securing, or claiming that he had been authorized to act in behalf of some so to the said John T. Kelly, and that he said John T. Kelly is in fact, during the period of time mentioned, not by any act contributing up to and including the year 1924, having actually made some of money from persons who were desirous of being favored in the matter of resolutions or ordinances in relation to amusement-conditions and municipal matters-particularly in the service of the Board of Education of the City of Chicago, and that as a result of payments of such character, the said John T. Kelly did improperly misrepresent in favor of certain individuals in connection with municipal and promotions or amusement-conditions and controlling employer-conditions in the service of the Board of Education of the City of Chicago."

As we understand the relator's position, it is not contended that the Board of Education was without jurisdiction in this matter, or that it exceeded its jurisdiction, or that any of the terms of law were disregarded in the proceeding. Neither is there any contention that there is no evidence in the record from which a finding of misconduct could be reasonably inferred, but relator's contention is that in the hearing of charges the Board by its finding the factors complained of, above, did not consider any that neither cause or use of wire tapping that all would be satisfied because it would thereby substitute its own judgment for that of the Board of Education; that the finding that relator was guilty of misconduct conduct only after a consideration; that the Board by its finding of facts has failed to direct and for this court that which must be held unconscionable conduct, and that this misbehaving conduct results, not of any use or of any number less than

all of the factors named, but all of them; that all the factors and the various elements composing these factors combined constitute a definition of that which the Board of Education has declared to be unbecoming conduct. The relator says that as thus defined the record does not sustain the conclusion of the Board that relator was guilty of unbecoming conduct.

It is undoubtedly true, as relator contends, that what is cause for removal is to be determined by the Board (Kammann v. City of Chicago, 222 Ill. 65), and that in this respect the duty of this court is to say whether the cause as defined by the trial board is legal (State v. Common Council of City of Duluth, 53 Minn. 238; Andrews v. King, 77 Me. 239), but it is not true, as relator contends, that all of the items contained in the finding must be sustained by evidence, otherwise the record should be quashed. There must be some evidence to sustain each essential element of the ultimate finding, but the precision of common law proceedings is by no means required and it is not necessary that unessential matters, although alleged, be proved.

In Murphy v. Houston, supra, we said:

> "It was the design of the legislature in the enactment of this statute to provide a mode of trial which would assure to accused employees substantial justice, not according to the technicalities of the common law, but according to right and justice, irrespective of legal technicalities."

The return of the Board of Education shows that there was a finding of guilt against the relator in two particulars - (1) inefficient management through failure to maintain proper supervision of the payrolls, and (2) improperly discriminating in favor of certain persons in the matter of making assignments and appointments. The record does not indicate, as relator insists we must hold, that it was necessary that evidence should be introduced tending to sustain both charges in order to justify a finding that the relator was guilty of unbecoming conduct. The

all of the findings combined, all of them, that all the findings and the various elements comprising them taken together constitute a definition of what under the terms of [illegible] was declared to be offending conduct. The reader must see that as thus defined the record does not contain the information as the Board that relation and policy of [illegible] conduct.

It is sufficiently true, as counsel suggests, that what is meant [illegible] is as illustrated by the Supreme (Gemsco v. City of Chicago, 307 Ill. 84), and that in this case the only of this court is to see whether the facts so found by the trial court is found (Ill[illegible] v. [illegible] City of Chicago, 99 Ohio. 363; [illegible] v. [illegible], 77 Ia. 381), but it is not true, as counsel contends, that all of the items contained in the finding must be sustained by evidence, otherwise the record should be quashed. There must be some evidence to sustain each essential element of the ultimate finding, but the precision of common law proceedings is by no means required and it is not necessary that unessential matters, although alleged, be proved.

(5 [illegible] v. [illegible], [illegible] 84 Ill.)

> "It was the design of the Legislature in the enactment of this statute to provide a method of trial which would insure to accused employees substantial justice, not according to the technicalities of the common law, but according to right and justice, irrespective of legal technicalities."

The return of the board of [illegible] shows that there was a finding of guilt against the relator in two particulars — (1) insufficient [illegible] through failure to maintain proper supervision of the [illegible], and (2) [illegible] in favor of certain persons in the [illegible] of [illegible] and appointments. The record does not disclose, as counsel insists we must hold, that it was necessary that evidence should be introduced tending to sustain both charges in order to justify a finding that the relator was guilty of offending conduct. The

finding of the Board is to the effect that Kiely was guilty (1) "in that," following which are the facts found tending to sustain the first paragraph of the report; (2) in "that*** further," following which is a recitation of facts tending to sustain the second allegation, and it is apparently to express the conclusion of the Board that the things recited in this second specification also constituted unbecoming conduct. The situation is not unlike that where, in a proceeding against a person accused at common law, the indictment is laid in several counts and proof of the material facts alleged in any one of the counts justifies a general verdict of guilty. That this was the thought of the Board is, we think, apparent from the very fact that the paragraphs of the report were distinguished by numerals. If we correctly interpret the report, the fallacy of the objections made by the relator at once becomes apparent. He says that there is no evidence of anything done by the relator between the years 1912 and 1920, while the finding purports to cover these years. It is apparent, however, that the precise dates of this conduct are not material. The relator asks what evidence there is of inefficient management during the period from 1912 up to 1918, and replies that there is absolutely none. There is abundant evidence in the record tending to show inefficient and improper management during later years and up to the time that the relator was suspended. It was not necessary, we think, that proof of some misconduct during every hour and every day of the years laid in the accusation should be produced. The allegation of time was not of the essence of the accusation.

The relator says that paragraph 1 of the finding requires proof of two distinct items; that one of these items is the charge of inefficient management and improper performance of duties and the other is the improper supervision of the payrolls;

finding of the Board is in the effect that Kelly was guilty (1) "in that," following, which are the facts found, "on or about the first day of the month; (2) in that on further," following which is a recitation of facts leading to another the same allegation, and it is unnecessary to mention the conclusion of the Board that the charge relating to under-weight specifications was sustained and constituted misbehavior, conduct. The situation is not unlike that which, in a proceeding against a person accused at common law, the indictment is laid in several counts and each of the material facts alleged in any one of the counts constitutes a general verdict of guilty. Even this was the charge of the Board is, as stated, improper, for the very last two in the charges of the report were established by evidence. (I do not recite) interpret the report, the finding of the allegations only in the relation at once between reports. We have this fact: (1) mis-demeanor of omitting from by the relation between the years 1911 and 1920, while the finding brought to cover these years. It is ex-parent, however, that the matter dates of such omission was not material. The relator was most relevant when (2) inefficiency management during the period from 1917 to 1920 and, relative that there is absolutely none. There is evidence of the report leading to more inefficient and improper management during later years and so to the time that the relator was suspended. It was not necessary, or proper, that proof of some misconduct during every hour and every day of our years laid in the accusation should be produced. The allegation of time was not of the essence of the accusation.

The relator says that paragraph 5 of the finding contains proof of the charges; that one of these lines is the charge of inefficient management and improper maintenance of duties and the other is the improper employment of the expressly;

that the charge of inefficient management has to do with a different period from the charge of improper supervision. It is, however, perfectly apparent from the facts proved that the nature of the relator's duties was such that improper supervision also constituted inefficient management, and there was abundant proof of both within the times limited by the finding.

It is, however, urged that the only evidence tending to support the charge of failing to maintain proper supervision of the payrolls is based upon the incorrect theory that the relator was chargeable with the acts of his subordinates, with the appointment of whom he had nothing whatever to do. Relator says that he is not so liable, citing People ex rel. Campbell v. Campbell, 82 N. Y. 247. In that case the relator was removed from his position as chief engineer of the Croton aqueduct by the commissioner of public works in the City of New York, who had appointed him. His duties were to exercise general supervision over all the work carried on under the immediate supervision of the bureau of street improvements and he certified to the correctness of vouchers for the payment thereof. In all contracts for work he was termed the chief engineer of the department of public works. The City made a contract with one Byron for the construction of an arch of masonry, over which a roadway was to pass. The contract authorized the commissioner to appoint one or more persons to inspect the materials furnished and the work done. An inspector of the work was appointed by the commissioner with directions to report any work done or materials furnished not in accordance with the contract and to report the state of the work once each week. The arch was constructed and thereafter a portion of it fell. The commissioner called upon the relator to report the cause. He reported that it was bad workmanship, bad mortar and an imperfectly laid spandril. Upon these facts the commissioner removed relator. The court held that while

that the charge of insufficiency, management has to do with a criticism
series from the charge of improper supervision. It is, however,
particularly apparent from the fact that the charge of the
relator's duties was such that improper supervision was consti-
tuted insufficient management, and there was absolutely no
within the time limited by the ruling.

It is, however, argued that the duty existing
to support the charge of failing to maintain proper supervision of
the municipality is based upon the incorrect theory that the relator
was responsible with the acts of his subordinates, that the contrac-
tors of them he had nothing whatever to do. Relator says that he
is not so liable, citing Powell on Municipal Corporations, 94
N. Y. 247. In that case the relator was removed from his position
as chief engineer of the Croton aqueduct by the commissioner of
public works in the city of New York, who had authority
little more to exercise general supervision over the work
carried on under the immediate supervision of the bureau of
improvements and be satisfied as to the performance of work for
the proper interest. In all contracts for work he was termed the
chief engineer of the department of public works. The city made a
contract with one Byron for the construction of an arch of masonry,
over which a roadway was to pass. The contract contained the
condition to install one of very previous to commencing the masonry
furnished and the work done. The inspector of the city had approved
by the commissioner with directions to remove any work done by
materials furnished not in conformance with the contract and in
part the state of the work was not well. The work was commenced
and therefore a portion of it fell. The commissioner called upon
the relator to report the matter. The relator said it was the fore-
manship, but matter was an improper-like manner. Upon these
facts the commissioner removed relator. The court said that while

prima facie it was the relator's duty as supervising engineer to discover and prevent defects the ordinary rule might be modified by the necessities of a great city or the pressure of a multitude of important enterprises; that it was plainly impossible for the relator to watch personally the placing of every brick and the composition of the mortar daily prepared; that if he did so at all it could only be done through assistants detailed to the special duties; that where such engineer was sole master within the range of his appropriate duties and selected and appointed his assistants he might be justly held responsible for every inefficiency or incapacity, but he was not responsible where he had no power of appointment, which he did not have in that case. The court held that there was no evidence tending to justify his removal. The case, however, is clearly distinguishable from that disclosed by the facts here where there is evidence tending to show that thenrelator personally participated in the wrongdoing and secured pecuniary benefit therefrom.

Upon the theory which we have already held cannot be sustained, it is further argued that the first paragraph states that the school board was defrauded of large sums of money; that this may have been an essential element of the charge, but the record fails to show that the board actually lost any money through the alleged practice of padding. Moreover, it is urged that one or two acts cannot be termed as "a practice." We do not think an inference that a board lost money where its payroll was padded can be said to be unjustifiable and without any evidence to support it, nor do we think it necessary to decide the number of times in which an act must be repeated in order to justify the use of the word "practice" with reference to it. Proof that the wrongdoing had been so often repeated as to amount to a practice is not a necessary element of the charge.

During Lewis's it was the relator's duty as auctioneer, employee to discover and prevent defects the existence of which might be revealed by the necessities of a great city or the presence of a multitude of important motor lines; that it was plainly impossible for the relator to watch personally the minding of every tick and the composition of the mortar daily prepared; that if he did so it all it could only be done through assistants detailed to the special duties; that where such employees are acts merely within the range of his responsible duties and authorized and approved his evidence he might be justly held responsible for every inefficiency or incompetency, but he was not responsible where he had no power of appointment, where he did not know, in fact even. The court said that there was no evidence tending to justify his removal. The case, however, is clearly distinguishable from that dictated by the facts here where there is evidence tending to show that superintendent personally participated in the wrongdoing and asserted peculiarly benefit therefrom.

Upon the theory which we have already had occasion to be mentioned, it is further argued that the first paragraph states that the animal bones was delivered of large size of nearly; that this may have been an essential element of the charge, but the record fails to show that the bones actually lost by reason through the alleged practice of pedling. Moreover, it is urged that one or two acts cannot be termed as "a practice." We do not think an inference that a bored lost money where its payroll was padded can be made to be unjustifiable and without any evidence to support it, nor do we think it necessary to decide the number of times in which an act must be repeated in order to justify the use of the word "practice" with reference to it. Proof that the wrongdoing had been so often repeated as to amount to a practice is not a necessary element of the charge.

We think it unnecessary to follow the argument of the relator in detail. Points which we have not discussed are all based on theory similar to that which we have already disapproved. It was not the design in the enactment of section 12 of the Civil Service act, providing that employees should not be removed without cause, to furnish material for metaphysical dialetics. Substantial justice rather than technicalities of the law was the intention of those who framed the statute. It is not for us to weigh the evidence and it is not contended there is no evidence. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

We think it unnecessary to dilate on the grounds of the relator in detail. Points which we have not discussed are all based on theory which we find cited in some already disapproved. If one met the decision in the consideration of matters of the civil Service act, providing that employees should not be removed without cause, to furnish authority for entertaining disputes. Substantial justice requires that technicalities of the law was the intention of those who framed the statute. It is not for us to weigh the evidence and if it is not contended there is no evidence. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, J., and Kennedy, J., concur.

33213

176 A

S. T. BURTNESS,
Appellee,

v.

SMITH, HARDY & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of $389.07 entered upon the finding of the court. The defendant makes only one contention which is that the finding and judgment of the court was clearly and manifestly against the weight of the evidence.

There is, however, very little controversy as to material facts. These appear to be that on August 13, 1927, one G. J. Almquist was the owner of 15 shares of stock in a corporation known as the Hill State Bond & Mortgage Company, five of these shares were evidenced by one certificate and ten by another certificate. On that date he delivered the certificate for ten shares of this stock to one Robert Powell, taking therefor a receipt reciting:

> "8/13-1927. Received of G. J. Almquist the loan of ten shares of Hill State Bond & Mortgage Company stock, to be used as collateral for my benefit, the stock to be returned to G. J. Almquist within ninety days from above date. I agree to give G. J. Almquist five shares of Town Service Station stock when company is organized, as compensation for the above favor. I further agree to let Almquist have $150.00 within thirty days from above date."

This certificate of stock was endorsed by Almquist on the reverse side before the delivery thereof to Powell. There was a form of

assignment on the back, under which the owner Almquist wrote his name.

On August 26th thereafter, Robert Powell borrowed the sum of $200 from the defendant Smith, Hardy & Company and deposited with defendant this certificate as collateral security for this personal loan. Powell told Smith, the president of the defendant company, with whom he dealt, that he didn't like to pay the loan but would rather sell the collateral. Smith testifies, "So I said all right, and we found a buyer and sold it. It was a loan; he already had a loan. This is a change from a loan to a sale. We purchased the stock from Robert Powell. We did not purchase the entire ten shares, but we had an understanding that he was to have five shares back in the form of a straight certificate." On cross-examination, Smith says, "We didn't agree to change it from a loan to a purchase until we had an outlet and when he did that, that was when the sale as between ourselves and Powell was closed. It was closed by virtue of Burtness sending in his order to buy five shares."

On or about September 21, 1927, a representative of defendant called up plaintiff and told him that the defendant had five shares of the Hill State Bond & Mortgage Company stock in its office for sale and quoted him a price of $375 for these shares. The plaintiff accepted and sent to defendant his check to defendant's order for that amount. This check was enclosed in a letter from the plaintiff to defendant under date of September 21, 1927, in which he said:

> "Please have these shares transferred to A. T. Burtness, 4333 North Richmond Street, Chicago, before the first of October."

Defendant acknowledged receipt of this letter and check on September 24, 1927, stating:

> "The stock should be delivered to you very soon."

mortgagee on the back, under which the word Indorsee over his name.

On August 16th thereafter, Jacob Jewell borrowed the sum of $500 from the defendant, with Jerry L. Dwyer, who signed with defendant also certificate, as collateral security for this personal loan. Jewell failed, with the president of the defendant company, with whom he dealt, and he didn't like to pay the loan but would rather sell his collateral. Smith testifies, "I'm I said all right, and he found a buyer who said $5. He was a loser, he already had a loss. This is a change from a loss to a gain. He persuaded the plaintiff from recent Jewell. To his not produce the notes for examination, but he has an understanding that he can have five shares back in the form of a check be forthcoming." On cross-examination, Smith says, "Mr Alan's agent is trying to change it from a loss to a purchase until he had an option and then he did. Jewell was when the note is between ourselves and Jewell was absent. It was closed by values of Wilkerson working in his order on two checks."

On or about February 21, 1927, a representative of defendant called on plaintiff and told him that Mr. Wilkerson had five shares of the Bill Corp. and a Mr. Dwyer owed it. He offered for sale one note, the signature of Jewell for three shares. The plaintiff accepted and sent to defendant his check in defendant's order for the amount. This check was endorsed in a letter from the plaintiff to defendant which was of no consequence at. Jewell in which he said:

> "Please here three shares transferred to Mr. T. Dwyer, care Harry Alderman Agent, Chicago, before the first of October."

Defendant contended receipt of this letter was always as September 24, 1927, showing:

> "The stock should be delivered in ten days."

On or before September 26, 1927, plaintiff notified defendant by 'phone, cancelling the purchase, and on that date defendant wrote plaintiff that the writer found a memorandum in reference to the stock "which we had purchased for your account and sent to transfer to your name. * * Your check had been deposited to our account and it undoubtedly will be a good check, as we would not have executed the order for you and sent stock to transfer if we did not think you were responsible and a man of your word." Under date of October 5, 1927, plaintiff demanded in writing reimbursement in the sum of $375 covered by his check of September 21, stating that the order had been cancelled over the telephone upon the morning of September 26, 1927.

After the receipt of plaintiff's check, on September 24, 1927, defendant sent this certificate of stock to the Hill State Bond & Mortgage Company, stating that the certificates were sent for transfer, five shares to the plaintiff and five shares to Smith, Hardy & Company. The letter further stated:

> "The above stock is handed to you in trust for transfer and must be returned to Smith, Hardy & Co. at above address. Please rush this transfer. 20¢ revenue stamps enclosed."

The Hill State Bond & Mortgage Company refused to do so. The stock has never been transferred on the books of that company or otherwise to the plaintiff. Neither that certificate nor any other certificate representing the stock which he bought has ever been in his physical possession. As a matter of fact, under date of October 3, 1927, defendant was informed by the mortgage company that they were advised that Almquist had never passed title to the stock and quoted a letter received by the company from his attorney cautioning it against any request for the transfer of the stock upon the books. A letter in evidence under date of October 7, 1927, from the mortgage company to

On or before September 26, 1927, plaintiff notified defendant by 'phone, confirming the purchase, and on that date defendant wrote plaintiff that the writer found a memorandum in reference to the stock "which we had purchased for you; however one said to transfer in your name. * * Your check has been deposited to our account and it undoubtedly will be a week about. As we said on the 26th, we made the order for you and that stock is transfer it we will look upon you were responsible and a man of your word." Thereafter, on October 3, 1927, plaintiff remarked in writing relationship to the sum of $275 covered by his check of September 26, stating that the order had been cancelled over the telephone upon the morning of September 26, 1927.

After the receipt of plaintiff's check, on September 26, 1927, defendant sent this certificate of stock to the Will State Bank & Mortgage Company, stating that the certificate was sent for transfer, this course to the plaintiff and live shown to Smith, Kemp & Company. The letter further stated:

> "The above stock is handed to you in hand for transfer and must be returned to Smith, Kemp & Co. at above address. Please rush this transfer. Very revenue stamps enclosed."

The Will State Bank & Mortgage Company refused to do so. The stock has never been transferred on the books of that company to otherwise to the plaintiff. Neither that certificate nor any other certificate representing the stock which he sought has ever been in his physical possession. As a matter of fact, under date of October 4, 1927, defendant was informed by the mortgage company that they were notified that plaintiff had never passed title to the stock and quoted a letter received by the company from his attorney restraining it against any request for the transfer of the stock upon the books. A letter in evidence under date of October 7, 1927, from the mortgage company to

defendant indicates that new certificates had been prepared and forwarded to the president for his signature and had been received from him duly executed; but that the delivery was withheld on advice of its attorney. Further demands of defendant that the certificates should be delivered were unavailing.

The defendant cites Drain v. LaGrange State Bank, 303 Ill. 330, to the proposition that where the true owner allows another to appear to be the owner with full power of disposition so that an innocent person is led into dealing with the apparent owner, an estoppel may operate against the true owner which will preclude him from asserting his title. That proposition of law is not applicable to the facts of this case. Inquist, the true owner, is not a party to this suit.

It is urged that the delivery of a stock certificate is not essential to the transfer of the stock of the corporation. Colton v. Williams et al., 65 Ill. App. 466; Allen v. Williams et al., 212 Ill. App. 114; Wallace et al. v. Citizens State Bank et al., 205 Ill. App. 7, are cited to this proposition. It is true, as these cases hold, that a share of stock is the right which its owner has in the management, profits and ultimate assets of the corporation after the payment of debts; that the certificate is not the stock itself but only evidence of the ownership of the stock. The title to the stock is, however, created by registry in the books of the corporation. The evidence here fails to show that the shares of stock have been in fact registered in defendant's name. Moreover, the evidence, we think, clearly justifies the inference that it was the intention of the parties that defendant should deliver to plaintiff a certificate for five shares of this stock. Defendant did not deliver the certificate. It has not offered to deliver the certificate. It is apparent from the evidence that it is unable to deliver it,

defendant indicates that new certificates had been prepared and forwarded to the president for his signature and had been received from him duly executed; and that the attorney was ultimately on advice of its authority. Further dicta of Jackson that the certificates should be delivered were unnecessary.

The defendant cites Smith v. Alabama (124 U.S. 465), 31 L.Ed. 380, in the proposition that where the land office clerk another to appear to be the owner with full power of disposition as that an innocent person is led into dealing with the apparent owner, an estoppel may operate against the true owner that will preclude him from asserting his title. This proposition of law is not applicable to the facts of this case. Assuming, the true owner, is not a party to this suit.

It is urged that the delivery of a check certificate is not essential to the transfer of the land of the [illegible] Dalton v. Hillman et al., 46 Ill. App. 486; Kirk v. Hillman et al., 214 Ill. 632; Hillman et al. v. Hillman et al., 105 Ill. App. 7, are cited in this proposition. It is true, as these cases hold, that a grant of lands in the Public Domain can never be in the management, protection and ultimate control of the government after the payment of money but the certificate is not the grant itself but only evidence of the ownership of the grantee. The title to the state is, however, vested by delivery in the order of the [illegible]. The reasons here which do not show that the patent or [illegible] been in fact delivered in [illegible]. Moreover, the evidence, as shown, clearly justifies the inference that it was the intention of the parties that a patent should actually be issued and a certificate for two months of this effect. Defendant did not deliver the certificate. It has not claimed to deliver the certificate. It is apparent from the evidence that it is capable to believe it.

and plaintiff, not having received what he bought nor any tender to him of that which he bought, is upon the plainest principles entitled to the return of the consideration which he paid - this without regard to other questions argued in this case.

On the undisputed facts, plaintiff was entitled to recover and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McCurely, J., concur.

and plaintiff, not having received any in bought and any tender to him of that which he sought, is upon the pleadings plaintiff entitled to the return of the consideration which he paid - this without regard to other questions argued in this case.

In the undisputed facts, plaintiff was entitled to recover and the judgment is affirmed.

(Signed)

O'Connor, J., and Bonnright, J., concur.

32876

JOHN Q. WOODS, Appellant, v. FRANK HARRIS SONS CO., INC., Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 647

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE MELUCH delivered the opinion of the court.

This cause was tried before the court under an agreed statement of facts stipulated by the parties.

The contention of plaintiff is that he contracted with defendant to build a garage for the agreed price of $388.27, and that he paid on account thereof to defendant the sum of $165.

Defendant, on the other hand, contends that the contract was to sell specific merchandise at an agreed price and to perform labor thereon at an agreed price in the erection of a garage for plaintiff upon a piece of real estate owned by him.

It is not controverted that defendant substantially built the garage, which a fire destroyed completely without the fault or negligence of either party to the suit. In this suit plaintiff seeks to recover the $165, paid by him to defendant, and defendant interposes a set-off for the balance due him, as he claims, on the contract price. The trial court decided the issues by allowing the set-off and rendered a judgment in favor of defendant, after giving plaintiff credit for his payment to defendant of $165, and allowing a further

credit of $10, which it was stipulated was a reasonable allowance to defendant for necessary labor to complete the building, had it not been destroyed by fire, in the sum of $313.27, and plaintiff brings the record here for our review by appeal.

Among the admitted facts found in the stipulation are the following:

That if the garage had been completed without being destroyed by fire, plaintiff would have paid to defendant $388.27, and "that all goods, materials, hardware, windows, glass, etc. were delivered by defendant * * and that the value of all materials together with the labor necessary in the complete erection of said garage, would equal the sum of $388.27, and that all the work that was done by defendant was done in a good and workmanlike manner."

The stipulation of facts in effect admits that defendant entered upon the performance of the contract between the parties to build the garage and that it did so until near completion, when it was unfortunately destroyed by fire. How the fire occurred does not appear, except that it is agreed that neither of the parties were blamable for it. The parties have by their actions placed their own construction upon the contract from which it is inferable that the agreement of defendant was to construct the garage which defendant proceeded to do, until near completion, when fire destroyed it.

The destruction by fire of the nearly completed garage did not have the effect of absolving defendant from its obligation to complete its construction.

cocoa of 1[illegible], which it was originally the a reasonable allowance to distribute for necessary labor to maintain the building, had it not been destroyed by fire, in the sum of [illegible], and plaintiff brings his amended bill for the recovery of same.

Among the relevant facts proved in the litigation are the following:

That at the period the town mentioned in the pleadings was destroyed by fire, plaintiff could have sold to individual [illegible] "and all goods, materials, furniture, utensils, glass, etc. were delivered by defendant" - and that the value of all material together with the labor necessary to the complete execution of said policy, would equal the sum of [illegible], and that all the work that was done by defendant was in a place not ordinarily accessible.

The circumstances of these is almost shocking that defendant entered into the performance of the contract between the plaintiff to build the house, for that it did so until such contradiction, that if the satisfactorily determined by fire, has the fire occurred then his slightly. Hence that it is [illegible] that neither of the parties were blameless in it. The property been by their actions placed their own construction upon the contract from which it is inferable that the expression of defendant was to construct the house which defendant undertook to do, until must completed, then fire destroyed it.

The destruction by fire of the nearly completed house did not have the effect of dissolving defendant from the obligation to complete its construction.

We think the law governing this situation is well stated in Sec. 1964, 3 Williston on Contracts, 3338, as follows:

> "In many cases where a builder or contractor has undertaken to erect a building or other structure, it has been injured or destroyed without fault of either party while in process of erection. It is uniformly held that the builder or contractor still remains bound by his promise, and will be liable in damages if he fails to complete the structure. Whether the injury or destruction was due to tempest, fire, defective soil, is immaterial."

The learned author points out the distinction where the contract is not to construct a building but to do certain work thereon in these words in the succeeding section:

> "Though one who contracts to build is not discharged from liability on his contract because of the destruction of his first or other attempts to perform the contract, the situation is different where the contract is to do work on a building and the building is destroyed. Here the parties assumed the continued existence of the building upon which the work was to be done, and if this assumption ceases to be true, the obligation is discharged. Even though another similar building were erected, the contractor would not be bound to work upon that. It would be a different building and a variation of his contract. The more troublesome question whether the builder can recover compensation for the work which he has done, is subsequently considered."

Bacon v. Gobb, 45 Ill. 47; Adams v. Nichols, 19 Pickering, 275; Schwartz v. Saunders, 46 Ill. 18; Huyett v. Edison Co., 167 ibid 233.

In Adams v. Nichols, supra, the court stated the governing principle, in which we concur, as follows:

> "We are, on the whole, clearly of opinion, that the unfortunate casualty, which occurred in this case, did not relieve the defendant Nichols from his obligation to perform the contract which he had deliberately entered into."

We think the law governing this situation is well stated in Am. Jur., 1944, 3 Illinois on Contracts, 1200, in relevant part:

> "In order under a builder or contractor the under an to erect a building or other structure, it has been injured or destroyed without fault of either party while in process of erection. It is matter of fact that the builder or contractor will usually be his property, and will be liable to damages if he fails to complete the structure. Further the injury or destruction was due to tempest, fire, accident and, is immaterial."

The learned author states not the decisions for which the contract is not to construct a building but to be certain work thereon is there work in the succeeding sections:

> "Though the contract to build is not discharged from liability on his contract because of the destruction of the first or other attempts to perform the contract, the situation is different where the contract is to do work on a building and the building is destroyed. Here the parties assumed the continued existence of the building upon which the work was to be done, and if this assumption ceases to be true, the obligation is discharged. Even though neither builder nor contractor would not be bound to work upon that. It would be a different building and a variation of his contract. The are usually some qualifications where the builder or contractor contemplation for the work which he has done, is reasonably compensated."

Bacon v. Cobb, 40.111. 47; Lucas v. Nichols, 14 Iowa 1, 1944; Lowering v. Lowering, 46 Ill. 18; Lewis v. Nelson Co., 167 Ind. 321.

In Adams v. Hinckle, supra, the court stated the governing principle, in which we concur, as follows:

> "We are, on the plain, clearly of opinion, that the unfortunate casualty, which occurred in this case, is not relieve the defendant liable from his obligation to perform the contract which he had deliberately entered into."

These remarks are equally applicable to defendant in the instant case. The following observations made by the court in Tompkins v. Dudley, 25 N. Y. 272, are pertinent to the situation of defendant in this case, viz.,

> "A substantial compliance with the terms of the contract will not answer when the contractor, as in this case, admits and concedes that the work was incomplete; he was still in possession engaged in its completion."

The responsibility of defendant is as stated in the following holding by the court in Ahlgren v. Walsh, 173 Calif.27:

> " He must stand the loss resulting from the fire and must replace at his own expense the structure that is destroyed. When he has done so, he may recover the full contract price. He is not excused from completing the performance of the contract by the fact that the fire has destroyed the structure already made. It is nevertheless possible for him to begin again and rebuild the entire building."

The instant case does not fall within the ruling in Siegel v. Eaton & Prince, 165 Ill. 550. The facts in each case are entirely dissimilar. There the contract was not to build the building, but to do work in a building, which building was during the progress of the work destroyed by fire. There are many other cases which might be cited, which uniformly hold to a like effect.

Under the facts in this record the question of "impossibility" is not a factor.

In consonance with the foregoing opinion the judgment of the Municipal Court is reversed, and a judgment entered here in favor of plaintiff for $165 with costs against defendant here and below.

JUDGMENT REVERSED AND HERE FOR PLAINTIFF FOR $165, WITH COSTS HERE AND BELOW AGAINST DEFENDANT.

WILSON AND RYNER, JJ., CONCUR.

These remarks are equally applicable to defendant in the instant case. The following answers given by the court in Tomkins v. Dudley, 34 N. Y. 272, are relevant to the situation of defendant in this case, viz.,

> "A subtenant entirely with the terms of the contract will not answer that contract, so in this case, admits the proposition that the rent was incontrovertibly by the still in possession thereof in the complainant."

The responsibility of defendant is in principle the following holding by the court in Gilmore v. Lynch, 172 Cal. 27:

> "He must stand the loss resulting from the fire and must replace at his own expense the structure that is destroyed. Even he has done so, he can recover the full contract price. He is not excused from completing the performance of the contract by the fact that the fire has destroyed the structure already made. It is merely that he is responsible for his to begin again and rebuild the entire building."

The theories cited do not fall within the ruling in Ellard v. Orton & Litton, 18 Ill. App. 1. The there is much less authority dissimilar. There the contract was not to build the building, but to do work in a building, which building was subject the possession of the work performed by them. There are many cases which might be cited, which sufficiently hold to a like effect.

Under the facts in this record the question of "impossibility" is not a factor.

In accordance with the foregoing motion the judgment of the municipal court is reversed, and a judgment entered herein in favor of plaintiff for $128 with costs against defendant herein and below.

> Jurisdiction retained for the purpose of entering the order herein and in order conform to the opinion.

Filed 12th day, 1.., 1922.

32981

FRANK R. HAMILTON	)	APPEAL FROM
Appellee,	)	
	)	MUNICIPAL COURT
v.	)	
	)	
EDWARD WESTERBERG,	)	OF CHICAGO.
Appellant.	)	

252 I.A. 647

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action in an effort to recover a real estate commission from defendant, the owner of property at 6338 and 6340 Fletcher Street, Chicago, for which plaintiff claims to have procured a purchaser at the sum of $11,800; the commission thereon amounted to $477.

There was a trial before the court and a finding and judgment for one-half of the commission claimed, viz., $238.50, and the cause is here for our review on defendant's appeal.

The defendant in his affidavit of merits swore that he did not list the property with the plaintiff, but on testifying as a witness in his own behalf admitted that he did so list the property with plaintiff for sale. It seems that the trial judge was much impressed with this contradictory conduct of the defendant. The finding of the court and its judgment was based upon the theory that the plaintiff sold one of the two houses to a Mr. and Mrs. Hinckle for the sum of $5900. So far as the sale to the Hinckles is concerned, there is evidence in the record legally admitted to support

Opinion filed April 17, 1950

the finding and judgment of the trial court, but as to the second building, for which plaintiff claimed a commission, there is no evidence in the record to support the claim. This is not disputed, and there are no cross errors bringing that matter before this court for review.

Plaintiff in talking the matter over with defendant said that he owed him a commission on the sale of one of the buildings, and that if the other building was sold he did not know who bought it. There is no dispute about the right to a commission. It was agreed in open court that each house was sold for $5900, and that the commission on each of them amounted to $238.50. It appears in evidence that plaintiff advertised defendant's property for sale after defendant listed the property with plaintiff.

Defendant argues for reversal that plaintiff was not a duly licensed broker. Be this as it may, the point was not raised in the trial court, and it is therefore too late to raise it here for the first time. It was also argued for reversal that plaintiff did not prove the rate of commission charged by real estate brokers in Chicago. While that is true, it is unnecessary to make such proof in the light of the admission of defendant of the amount of the commission, if recovered. Again, it is argued for reversal that the trial judge erred in admitting improper evidence on behalf of the plaintiff. As before said, the finding and judgment are supported by a preponderance of the admissible evidence. This court will assume that the trial court in arriving at its finding, only took into consideration such evidence as was legally admissible.

the finding and judgment of the trial court, but as to the second building, for which plaintiff claimed, [illegible], there is no evidence in the record to support the finding. This is not disputed, and there are no cases which [illegible] this matter before this court for review.

Relatively to finding the matter over into defendant said that by good luck a consolidation on the original use of the buildings, and that if the other building was sold he did not know who bought it. There is no evidence about the right to a consolidation. It was agreed in view every [illegible] was sold for [illegible], and that the consolidation so made by them amounted to [illegible]. It appears in evidence that plaintiff advertised defendant's property for sale after defendant listed the property with plaintiff.

Defendant argues for reversal that plaintiff was not a duly licensed broker. In this he is in error. The matter was not raised in the trial court, and it is therefore too late to raise it here for the first time. It was also argued for reversal that plaintiff did not prove the exis of commissions charged by real estate brokers in Chicago. While this is true, it is unnecessary to make such proof in the light of the admission of defendant of the amount of the commission, if recovered. Again, it is argued for reversal that the trial judge erred in admitting incomer evidence on behalf of the plaintiff. As before said, the finding and judgment are supported by a preponderance of the substantial evidence. This court will assume that the trial court in arriving at its finding, only took into consideration such evidence as was legally admissible.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON AND RYKER, JJ., CONCUR.

32990

S. E. CHAPIN,

Appellee,

v.

THEODORE M. BLUMENTHAL, doing business as CHICAGO STORE FIXTURE EXCHANGE,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

257 A. 647

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE BOLDEN delivered the opinion of the court.

This is an action of assumpsit started by the plaintiff against defendant in an effort to recover the sum of $2000, the price of certain store fixtures bought by defendant from plaintiff. Plaintiff filed a one count declaration with an affidavit of claim. Defendant filed a plea of non assumpsit, and also an affidavit of meritorious defense in which affidavit defendant denied that he purchased the fixtures and agreed to pay $2000 for the same, and deposed that plaintiff gave defendant a quantity of store fixtures that were practically valueless as compensation for their removal from the place in which they were stored and the expense of so doing.

There was a trial before court and jury with a resulting verdict of $1750 in favor of plaintiff and against defendant. After overruling motions for a new trial and in arrest of judgment there was a judgment on the verdict and defendant brings the record here for review by appeal.

No questions arise upon the pleadings.

Opinion filed April 17, 1939

Mr. Justice Dunne delivered the opinion of the court.

This is an action of assumpsit started by the plaintiff against defendants in an effort to recover the sum of $1200, the price of certain stock Firestone bought by defendants from plaintiff. Plaintiff filed a two count declaration with an affidavit of claim. Defendants filed a plea of non assumpsit, and also an affidavit of merit setting forth in which affidavit defendant stated that a salesman for Firestone had spread on pretense for the sale, but declared that plaintiff knew defendant's identity or some circumstances that were sufficiently material to warrant the defendants recovering from the place in which they were owned and for excuse of so doing.

There was a trial before court and jury with a resulting verdict of $1200 in favor of plaintiff and against defendant. After overruling motions for a new trial and in arrest of judgment there was a judgment on the verdict and defendant prays the record here for review by appeal.

In statement arise upon the pleadings,

There was evidence supporting the contentions of both parties and the facts thus developed were fairly submitted to the jury for their solution.

Defendant assigns error and argues for reversal, that there was error in the court's ruling upon an impeaching question asked plaintiff by defendant; that the judgment is contrary to the manifest weight of the evidence, and that the verdict and judgment are inconsistent with any possible theory of the case.

On cross examination plaintiff testified that the fixtures were slightly damaged. He was then asked by counsel for defendant this question:

> "Isn't it a fact, Mr. Chapin, that upon the trial of the case of the Diana Catering Company against the insurance company, in November, 19??, in the City of Rockford, before Judge Reynolds and a jury, you there testified that the fixtures in the Diana restaurant were totally destroyed and of no value?"

An objection by counsel for plaintiff was sustained, and he was then asked:

> "Did you at that time and place testify that the fixtures were totally destroyed and of no value?"

An objection made to that question by plaintiff's counsel was likewise sustained. Defendant now argues that the rulings of the court were erroneous because it is the law that the witness may give the substance of the witness' previous testimony, citing Brown v. Calumet River Railway Co. 135 Ill. 600, where it is said that:

There was evidence concerning the negotiations of both parties and the terms upon which the defendant was willing to settle.

Defendant contends error lies because the trial court, that there was error in the court's ruling upon an immaterial question based primarily on inferences; that the judgment is contrary to the manifest weight of the evidence; and that the verdict and judgment are inconsistent with certain phrases of the case.

On cross examination plaintiff testified that the fixtures were slightly damaged. The trial court asked by inquiry for defendant this question:

> 'Isn't it a fact, Mr. Sheppy, that such the trial of the case of the Clear Cleaning Company against the Insurance Company, in the amount, in the City of Chicago, before Judge Kenesis and a jury, you there admitted that the fixtures in the Clear restaurant were totally destroyed and of no value?'

An objection by counsel for plaintiff was sustained, and he was then asked:

> 'Did you at that time not claim totally the fixtures were totally destroyed and of no value?'

An objection was to that question on plaintiff's counsel was sustained. Defendant now argues that the actions of the court were prejudicial because it is the law that the witness may give the substance of the witness' previous testimony, citing Brown v. Chicago Elev. Ry. Co., 191 Ill. 60, where it is said that:

> "It is objected that no proper foundation was laid for the introduction of this evidence. We think otherwise. It was only necessary to call Brown's attention to the substance of his admission (Craig v. Mohrer, 63 Ill. 335) and that, in our opinion, was here sufficiently done."

The difficulty lies in the fact that the witness was not asked to give the substance of what he had previously testified to, nor was the other mode of asking and impeaching question indulged, viz., by asking the precise question that was asked at the trial referred to and his answer thereto. Neither did counsel preserve the point for review by making the offer to prove what the witness was alleged to have testified to on the previous trial referred to.

The objections to the two foregoing questions in the form in which they were propounded were clearly subject to the objections made.

We are unable to concur in defendant's contention that the verdict is against the manifest weight of the evidence. The contradictions in the testimony of the contending parties was the burden of the jury to solve, and if the jury gave greater credence to the proofs of plaintiff and less to that of defendant, so doing was within the jury's province. An examination of plaintiff's proofs standing uncontradicted warrants the conclusion to which the jury arrived. This conforms to legal requirement.

The final contention that the verdict is inconsistent on any possible theory of the case falls flat in the light of what we have above said. Furthermore defendant has no just cause of complaint at the verdict because the jury

"It is objected that no proper instruction was laid for the introduction of this evidence, to which objection, it was only necessary to call Jones's attention to the substance of his examination (Jones v. Jones, 41 Ill. 339) and that, in our opinion, was more sufficiently done."

The difficulty lies in the fact that the witness was not asked to give the substance of what he had previously testified to, nor was the other mode of curing the technical question indulged, viz., by putting the leading question that was asked at the trial relating to the witness's former testimony, either did counsel preserve the point for review by making the offer to prove what the witness had alleged to have testified to on the previous trial referred to.

The objections to the two foregoing questions in the form in which they were pronounced were clearly subject to the objections made.

We are willing to honor in Schmidt's questions that the verdict is against the manifest weight of the evidence. The contradiction in the testimony of the rebutting witnesses was the crucial of the case to which, as if the jury gave greater credence to the witnesses in rebuttal and less to that of defendant, at trying was within the jury's province. An examination of plaintiff's charge regarding contributory negligence warrants the conclusion to which the jury arrived, this conforms to legal requirements.

The final contention that the verdict is unreasonable on any possible theory of the case fails flat in the light of what we have above said. Furthermore, plaintiff has no just cause of complaint at the verdict because the jury

minimized defendant's liability. Plaintiff has the sole right to complain and he stands content. Even had he assigned cross errors on the point, it does not follow that this court would award a new trial. The rule applicable is correctly and well stated in Gilderman v. Pitts, 39 Ill. App. 416, in these words:

> "It does not follow that because the verdict is for a sum less that the price claimed the jury did not find the contract was fully performed by appellee. Plaintiff might justly complain if the verdict is for less than he was entitled to recover, but if he chose to sustain the loss rather than to have the verdict set aside and incur the expense and delay of another trial he had the right to do so and ought not to be deprived of the benefit of his judgment for the amount of the verdict rendered."

And as said in Roth v. Fleck, 242 ibid. 336, so say we here:

> "The rule is a familiar one that 'where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict even though it may be against the apparent weight of the evidence a reviewing court will not set it aside'."

There is no discernable reversible error apparent in the record before us and the judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON AND RYHER, JJ., JOINED.

minimized defendant's liability. Clearly, he did not have right to consider his or bounds on trial. Here has no logical cross errors on the point, it does not follow that this court would award a new trial. The trial judgment is correctly had well stated in Gilchrist v. Cities of Tl. Ign. 62, in which court:

> "It does not follow that because the evidence in for a new trial the judge claiming the jury did not find the evidence was fully sufficient to warrant. Liberal rules greatly enlarge it the verdict in for, yet close in one and slow to recover. But it is clear in matter the less reason than to have the evidence and judge and hence the evidence and duty of another trial be based on to be on and ought not to be deprived of the benefit of his judgment for the amount of the verdict increased."

and as said in Hunt v. Lines, 60 Iowa, 490, in say as here:

> "The rule is a familiar one that courts cannot in a consistency of evidence and the decisions of fair and reasonable intelligent all intention the verdict even though it may be against the weight of the evidence a reviewing court will not act in making."

There is no discernible reversible error appears in the record which we and the judgment of the plaintiff's court is affirmed.

(Signed)

Judge (R) Stone, J., Concur.

33044

GEORGE C. LOWE, Appellee, v. ARTHUR H. RANCE, HENRY B. RANCE, and HUBERT F. RANCE, doing business as PRUDENTIAL REALTY COMPANY, Appellants.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 647

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This action involves the right of defendants to retain the earnest money paid under a real estate contract, executed by the plaintiff and the purchasers, and delivered to defendants, both contract and money, to hold in escrow. The purchasers refusing to carry out their part of the contract by paying the balance of the purchase price, the plaintiff brings this suit against defendants to recover the $200.00 earnest money.

The statement of claim alleges the execution of the contract, the deposit with the defendants of the earnest money of $200.00, the refusal of the purchasers to proceed with the contract, the service of a demand by plaintiff, and the refusal thereafter of the defendants to pay over the $200.00 deposit.

In defendants' affidavit of merits they charge that under the contract upon forfeiture of the earnest money, it should be used first to pay brokers' commission, and that the money was so applied. The contract in evidence disclosed that if the purchasers failed to perform the contract promptly,

Opinion filed April 17, 1939

Mr. Justice MARTIN delivered the opinion of the court.

This action involves the right of defendants to retain the earnest money paid under a real estate contract, executed by the plaintiff and the defendants, and delivered to defendants, both contract and money, to hold as escrow. The proceeds relating to money and their suit of the contract by paying the balance of the purchase price, the plaintiff brings this suit against defendants to recover the [illegible] earnest money.

The evidence of plaintiff shows the following: in the contract, the deposit with the defendants of the earnest money of $100.00, the refusal of the vendors to proceed with the contract, the service of a demand by plaintiff, and the refusal thereafter of the defendants to pay over the $100.00 deposit.

In defendants' affidavit of merits they charge that under the contract upon forfeiture of the earnest money, it should be used first to pay brokers' commission, and that the money was so applied. The contract in evidence discloses that if the purchaser failed to perform the contract promptly,

the earnest money should, at the option of the plaintiff, be retained as liquidated damages. The purchasers defaulted and by notice served by the vendor, plaintiff, the contract was for feited and the $200.00 earnest money deposited was also declared forfeited.

The foregoing facts are not in dispute.

The question of the necessity of producing a purchaser, ready, willing and able to purchase the property, was not presented to the trial court, nor is it presented to this court for decision, because the undisputed evidence is that the parties, seller and purchasers, entered into a contract in writing which was of binding force on each party. When a valid contract of sale is entered into, which has been accepted by the seller, as in the case at bar, without any fraud intervening, the payment of the agent's commission is not contingent upon the actual consummation of the sale. After the contract is signed he is entitled to his commission.

As said in Carr v. Butterworth, 219 Ill. App. 14,

> "The law in this state is well settled that where an owner lists his real estate with a broker for sale, the broker has earned his commission where the broker produces a prospective purchaser whom the owner, without fraud on the part of the broker, accepts, and with whom the owner enters into a valid, binding, and enforceable contract for sale, and in that case it is immaterial whether the contract is carried out, or fails to be carried out by reason of the default of the prospective purchaser." Wilson v. Mason, 158 Ill.304.

In Fox v. Ryan, 240 Ill. 391, following Wilson v. Mason, supra, the court laid down the rule in the following language:

the contract money should, at the option of the plaintiff, be restored as liquidated damages. The counterclaim contained and by notice served by the vendor, relisted, the contract was for failed and the £200.0.0 earnest money deposited was also declared forfeited.

The Counsel, Hyde, for all of defendants.

The question of the validity of contracts, purchaser, terms, allegations and also by reference etc. correct, was not presented to the trial court, but is it presented to this court for decision, because the mentioned evidence in this the writing, Julier the Deed-Poll, deposit into a contract in writing which had to contract error be such form. Had a valid contract of sale. In issues into, which the deed concluded by the seller, we in the case of her, without the trial interpretation, the payment of the agent's commission is not contingent upon the actual consummation of the sale. Into the contract is signed by is entitled to his commission.

In this is Jones v. Wolfenstein, 49 Ill. App. 13,

"The law in this state is well settled and some in order that the duty owing with a broker and may the broker has earned the commission on the sale, inducing a purchaser, ready, able and willing, ready and able to buy the property on the terms of the contract, or a contract satisfactory to the owner, and the broker is entitled to his commission, if the failure to be entitled and by reason of the owner's or the purchaser's default." Jones v. Jones, 140 Ill. App.

In Hoe v. Jones, 193 Ill. App. 393, Fellowes, Justice, Hanna, Jones, the court has done the duty in the following language:

"Where the seller accepts the purchaser and enters into a valid contract of sale with him, the broker's commission is earned whether the purchaser subsequently fails to perform his contract and make the payments agreed upon, or not."

At the time of the commencement of the instant suit defendants had no money in their hands belonging to the plaintiff. They had the right to retain the money paid under the contract in accordance with the directions of the contract, that it should be first applied to the payment of any expenses incurred for plaintiff by his agent, and to the payment of plaintiff's broker's commission of $200. Under the express provision of the contract of purchase, executed by plaintiff, the agents after the forfeiture by plaintiff, had the right to apply the earnest money towards the payment of their commission.

The propositionsof law submitted to the court, seven in number, which the court refused to hold as the law applicable to the case, stated axiomatic principles of law for the guidance of the court in arriving at his decision upon the law of the case. It was error to refuse to hold such propositions as the law of the case. In so doing the trial judge failed to correctly direct himself as to the law.

As the cause was submitted to the court for trial without a jury by agreement of the parties, we will do here what we think the judge should have done, and reverse the judgment with a finding in favor of defendant with costs against the plaintiff both here and below.

REVERSED WITH FINDING FOR DEFENDANT WITH COSTS AGAINST PLAINTIFF HERE AND BELOW.

WILSON AND AYRES, JJ., CONCUR.

> "Where the seller accepts the purchaser and enters into a valid contract of sale with him, the broker's commission is earned whether the purchaser subsequently fails to perform his contract and pay the agreed price, or not."

As the time of the commencement of the instant suit, defendants had no money in their funds belonging to the plaintiff. They had the right to return the money and cancel the contract in accordance with the directions of the seller, that it should be first applied to the payment of any commission incurred for plaintiff by his agent, and to the payment of plaintiff's broker's commission of $250. Under the terms controlling of the contract of brokerage, assumed by plaintiff, the agents after the Corporation by plaintiff, had the right to apply the actual money towards the payment of their commission.

The counterclaim was submitted to the court, sitting in banc, which the court attempt to rule as the law applicable in the case, giving commercial significance of law for the guidance of the court in settling at the decision upon the law of the case. It was error in failure to rule and instructions as the law of the case. In the order the court failed to correctly direct itself as to the law.

In the trial the decision of the court for trial without a jury by agreement of the parties, is still in error not as which the judge should have done, [illegible] the judgment with a finding in favor of defendant with costs against the plaintiff who have not paid.

Respectfully submitted,
[illegible]
Counsel.

Atlanta, Ga., January.

33059

WILLIAM O. DIERCKS,

Plaintiff - Appellant,

v.

JULIUS WEISS and HERMAN SCHUESSLER, JR.,

Defendants - Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 648

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This appeal is not defended.

The action involves a lease from the plaintiff to the defendants of certain premises in Chicago. Among the covenants in the lease there was a power of attorney authorizing the entry of a judgment for any unpaid rent. Such a judgment was entered under the lease in question for unpaid rent $2905 on July 11, 1925. On March 5, 1926 on motion of the defendant Herman Schuessler Jr. the judgment was opened and he was let in to plead, and on June 18, 1926, that order was vacated and on the additional petition of defendant Julius Weiss leave was given both defendants to appear and defend, the judgment to stand as security and execution stayed and that the petition of June 4, 1926 stand as the affidavit of merits of both defendants. In accord with the last order and on June 6, 1928, the cause proceeded to trial before court and jury with the resulting verdict against the plaintiff and in favor of defendants. Plaintiff made motions for a new trial and in arrest of judgment, which were both denied, and a judgment of nil capiat and for costs entered upon the verdict, and also vacating and setting aside the judgment entered on July 11, 1925 for $2905, from which latter judgment plaintiff prosecutes this appeal.

32050

Kirkin C. Lawson,

Plaintiff - appellant,

v.

Public Wines and Liquors Commission, et al.,

Defendants - appellees.

Opinion filed April 17, 1929

Mr. Justice Dunn delivered the opinion of the court.

This appeal is not perfected.

The action involves a lease from the plaintiff to the defendants of certain premises in Chicago. Among the covenants in the lease there was a power of attorney authorizing the entry of a judgment by any legal firm. Such a judgment was entered under the lease in question for unpaid rent on July 11, 1925. On March 5, 1928 on motion of the defendant Lorenzo Schwarzler Jr. the judgment was opened and he was let in to plead, and on June 19, 1928, that motion was vacated and on the additional petition of defendant Julius Weiss leave was given both defendants to answer and defend, the judgment to stand as security and execution stayed and that the petition of June 4, 1928 stand as the affidavit of merits of both defendants. In accord with the last order and on June 6, 1928, the cause proceeded to trial before court and jury with the resulting verdict against the plaintiff and in favor of defendants. Plaintiff made motions for a new trial and in arrest of judgment, which were both denied, and a judgment of nil capiat and for costs entered upon the verdict, and also vacating and setting aside the judgment entered on July 11, 1925 for $2500, from which latter judgment plaintiff prosecutes this appeal.

Plaintiff assigns and argues for error the action of the trial court in failing to grant the motion of plaintiff to strike the petition of defendants on the ground that it sets up no defense; errors in admitting improper evidence, and in sustaining objections of defendants to competent evidence of plaintiff; and in refusing to strike out on motion of plaintiff improper evidence introduced by defendants; and that the verdict and judgment are against the weight of the competent evidence; and error of the court in denying plaintiff's motion for a new trial.

Without discussing why the action of the court in opening the judgment by confession was without error, we will say that in the condition of the petitions presented to the court on the motions to open such judgment there were sufficient facts in said petitions undenied to warrant the court's action.

The lease in evidence of plaintiff to defendant, was of the premises 3800 to 3804½ Armitage Avenue, Chicago. etc., at a rental of $360 per month from June 1, 1923 to April 30, 1928, with the privilege to the lessees of cancelling the same as of April 30, 1925 on giving 90 days notice to plaintiff of exercising such privilege. The lessees, defendants, before they are permitted to sublet the premises or any part thereof, or to assign the lease shall obtain the written consent of the plaintiff to such subletting or assignment, etc. There is also a provision that if the defendants shall abandon or vacate the demised premises, the same may be relet by the plaintiff landlord for such rent and upon such terms as he shall see fit, and that if a sufficient sum shall not be realized, after paying the expenses of subletting and collecting, to satisfy the terms of the lease, defendants agree to pay and satisfy all deficiencies, and there is a warrant of attorney to confess judgment for default

Similarly counsel and judges for never the action of the trial court in failing to grant the motion of plaintiff to strike the pleadings of defendants on the ground that it was by no deliberate errors in admitting improper evidence, or in sustaining objections of defendants to competent evidence of plaintiff; and in failing to strike out as motion of plaintiff improper evidence introduced by defendants; and that reversing and judgment are against the weight of the competent evidence; and error of the court in overruling plaintiff's motion for a new trial.

Without discussing why the motion of the court in granting the judgment in question was without error, we will say that in the condition of the pleadings presented to the court on the motions to open such judgment there were sufficient issues in said pleadings pleaded to support the court's action.

The issue in evidence of plaintiff in defendant, and of the examiner 1000 in 3004 airplane issues, damage, etc., at a rental of 1500 per month from June 1, 1950 to April 30, 1954, with the privilege to the lessee of modifying the plane as of April 7, 1950 or giving 60 days notice to plaintiff of exercising such privilege. The lessee, lessees, lessee they are permitted to assign the premises or any part thereof, or to sublet the lease shall obtain the written consent of the plaintiff to such subletting or assignment, etc. There is also a provision that if the defendants shall abandon or vacate the demised premises, the same may be rented by the plaintiff landlord for such rent and upon such terms as he shall see fit, and that if a sufficient sum shall not be realized, after paying the expense of subletting and collecting, to satisfy the terms of the lease, defendants agree to pay and satisfy all deficiencies, and there is a warrant of attorney to confess judgment for default

in payment of the rent with attorney's fees, etc.

There appears upon the said lease an assignment by the defendant, Julius Weiss, to Paul Weiss and Paul Klank, with a recitation that in consideration of plaintiff's consenting to said assignment, said Julius Weiss guarantees the performance by the assignees of all the covenants mentioned in the lease. There is a written consent by plaintiff to the assignment of the lease to Paul Weiss and Paul Klank under the express condition that the assignor should remain liable for the prompt payment of the rent and the performance of all the covenants and conditions on the part of defendants, the lessees, in said lease mentioned. The defendant Schuessler did not at any time assign his interest in the lease.

It appears that the assignees abondoned the leased premises and thereupon plaintiff made a lease with George K. Gessler covering the remaining portion of the term of the lease sued upon. The foregoing facts appear without contradiction. Paul Weiss and Paul Klank sent the key to the demised premises to plaintiff announcing that they were through as the mayor had closed the place, and thereafter plaintiff made the lease to George K. Gessler.

It appears from the foregoing recital that while plaintiff consented to the assignment of the lease to Paul Weiss and Paul Klank, that did not release the defendants from their liability to pay rent. That as well under the covenants of the lease and the assignment thereof, they were held liable to pay all rent accruing under said lease notwithstanding the assignment. There was naught in that assignment which tended to release defendants from their responsibility to observe all the covenants of the lease as well after the assignment as before including

in payment of the year's attorney's fees, too.

There figures that the bill could be sustained by the defendant, during which, in that case for just fees, with a restriction that in consideration of defendant's contention that said assignment, said action from contracts the instrument by the assignees of all the economic conditions in the lease. There is a rights counter by plaintiff to the assignment of the lease in that lease was that first right under all original condition that the lessors which should transfer lease for the unused payment of the rent and the performance of all the economic and conditions on the part of defendants, the lessees, in said lease mentioned. The defendant homestead did not at any time assign his interest in the lease.

It appears that the assignees executed the lease and thereupon directly made a lease with Joseph C. Dentler covering the remaining months of the term of the lease and more. The terminal rent agreed upon was [illegible]. And there had not been any [illegible] payment to plaintiff concerning that the rent was [illegible] to the [illegible] and the [illegible], and [illegible] there to [illegible] C. Dentler.

It appears from the foregoing evidence that only plaintiff consented to the assignment of the lease to [illegible] and that fact, that did not release the defendant from their liability to pay rent. That we will under the assignment of the lease and the [illegible] thereof, they are not liable to pay all rent accruing under with [illegible] notwithstanding the assignment. There was doubt in that assignment which tended to release defendants from their responsibility to pay all the economic of the lease as well after the assignment as before including

the liability to pay rent accruing thereunder. The contract of the parties was in writing, and there is nothing in such contract releasing either of defendants from their contractual liability to pay rent for the demised premises. The evidence failed to establish a release of the defendants, or either of them, from their obligation to pay rent under the lease. When Weiss and Klank abandoned the premises and the defendants likewise, it became the duty of plaintiff to use his best efforts to minimize the damage resulting from such abandonment and non-payment of the rent as best he might. He thereupon proceeded to make a lease to George K. Gessler, as hereinbefore recited. As held in West Side Auction Co. v. Conn. Ins. Co. 186 Ill. 156:

> "Upon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises, preserve them from injury, and, if it could, re-rent them, thus reducing the damages for which the lessee was liable."

Moreover by the second clause of the lease it was so provided.

The attempt of defendants to claim a surrender of the premises, resting entirely in parol, is inadmissible to change or vary the contract of the parties in writing under seal. Furthermore such evidence was not admissible under the pleadings. On abandonment by the tenant a landlord taking possession of the demised premises under the covenants of the lease such taking possession will not operate to release the lessees from the payment of subsequently accruing rent. Grommes v. St. Paul Trust Co. 147 ibid. 634; Barnes v. Northern Trust Company, 169 ibid. 112.

Under the contract of the parties, evidenced by the lease and its assignment, plaintiff made such a prima facie case entitling him to a judgment for the amount of the unpaid rent in accordance with the covenants of the lease. This prima facie case was neither met nor overcome by any competent evidence proffered by defendants.

the liability to pay some accruing insurance. The receipt of the written and in writing, not there is nothing in such contract releasing either of defendants from their concurrent liability to pay rent for the demised premises. The evidence tended to establish a release of the defendants, or either of them, from their obligations in the rent under the lease. Then going not first announced the requisite for the defendants liability, it becomes the duty of plaintiff to use his best efforts to minimize the damage resulting from such abandonment and consequent of the rent as rent be right. The evidence presented in case a lease to George L. Gessler, is inconclusive insofar. As held in Post Life Building Co. v. Hess, Inc. 1d 111, 1.

> "Upon the abandonment of the premises by the tenant it was the right and the duty of the landlord to take charge of the premises, preserve them from injury, and, if it could, re-rent them, then receiving the rent for which the lessee was liable."

Moreover by the second clause of the lease it may be provided.

The effect of defendants to claim a surrender of the premises, resting entirely in deed, is insufficient to change or vary the contract of the parties in writing under lease. Furthermore such evidence was not admissible under the pleadings. In Commonwealth by the Small v. Lockard Paint, Jewelers, If the tenant remains under the surrender of the lease such rights possession will not operate to release the lessee from the payment of subsequently accruing rent. Johnson v. Jones Fruit Co. 117 Ind. 534; Grimes v. Hartman Steel Company. 124 Ind. 11.

Under the contract of the parties, evidenced by the lease and its provisions, plaintiff was such a Prime Lease entitling him to a judgment for the amount of the rent not in accordance with the covenants of the lease. The Prime Lease was not subject and not overcome by any subsequent estoppel or by defendants.

The record is full of errors in the court's rulings upon the evidence, and we think this was given expression by the trial judge's remarks, when he said: "The trouble with this case is we have gone into a lot of extraneous matters, I want to clean it up." The rights of the parties are governed by the terms of the lease and its assignment on the conditions in such assignment named, but instead of adhering to the real issues to be tried the court permitted wide digressions therefrom. The court allowed counsel to inquire as to the drinking habits of some of the parties. The defendant Schuessler testified, against the objection of counsel for plaintiff, that plaintiff "got real tough", and the same witness again testified to some fighting and that he knocked plaintiff to the floor, and that plaintiff was intoxicated nearly all the time from May 18, 1923 to May 25, 1923, and that he wasn't sober after that; and again he testified that plaintiff was sober enough to know what he was talking about. On re-direct examination defendant Schuessler was asked if plaintiff had ever told him that he had taken treatment in an institution for drunkenness, and was asked on cross examination, "Were you ever sent to the psychopathic hospital?" to which the witness replied "I don't see why I should answer that question." Plaintiff's counsel objected, but his objection was overruled. The witness asked the trial judge, "Do I have to answer that?" On being advised that "The court says that you do", he answered "yes".

It seems that such testimony, elicited in the way it was, could have only been for the purpose of prejudicing the jury against the plaintiff. These proceedings tended to humiliate the plaintiff, and were entirely improper and uncalled for, and from the jury's verdict it would appear that such immaterial and improper testimony injected into the record, as before recited, deprived the plaintiff of that fair trial to which he was

The record is full of errors in the lawyer's reliance upon the evidence, and so which this was given authenticity by the trial judge's remarks, when he said: "The trouble with this case is we have gone into a lot of extraneous matters, I must in order to do." The rights of the parties are governed by the strict of the issue and the assignment on the questions in such assignments sound, but instead of adhering to the real issues as to be tried the most carelessly also introduced irrelevant. The court allowed counsel to indulge on to the arguing both of and of the witnesses. The defendants Commander Insulind, against the objection of counsel for plaintiff, that plaintiff "got real tough", and the same witness again testified to some fighting and that is alleged assault to the floor, and that plaintiff was intoxicated mostly all the time from day to day, and, that he (Jones's) after other times and again he testified that plaintiff was drunk enough to know what he was talking about. On re-direct examination defendant Commander was asked if plaintiff had ever told his boss or had been treated in an institution for drunkenness, and was asked to state conclusion. "Very yes and not to the psychiatric hospital" to which the witness replied "I don't see why I should answer that question." Plaintiff's counsel objected, but his objection was overruled. The witness added the total judge, "as I have to answer that" on being advised that "The court says that you do", is answered "yes".

It seems that such testimony, elicited in the way it was, would have only been for the purpose of prejudicing the jury against the plaintiff. These proceedings tended to identify the plaintiff, and were entirely improper and inadmissible, and from the jury's action it could appear that such inadmissible and improper testimony influenced into the record, as before remarked, involving the relativity of such fair trial to which he was

entitled under the law. On a retrial the errors above pointed out will not be repeated.

For the errors indicated the judgment of the Municipal Court is reversed, and the cause is remanded for a new trial to be had in accord with this opinion.

REVERSED AND REMANDED.

WILSON & RYNER, JJ. CONCUR.

restored under the law. In a nutshell the current copyright system will not be tampered.

For the sound information and judgment of the Delegates here in Lagos, and the Lagos Ia Commission for a job well done as started with this opening.

Thanks and Goodbye.

Wilson A Ayisi, Jr. Lagos.

33072

A. O. CHAPIN,

Appellee,

v.

E. H. SHEPPLEY AND G. W. SHEPPLEY, Doing Business as Sheppley Brothers,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

252 I.A. 648

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

This cause is here for the second time, and was disposed of by this court in an opinion handed down in case Gen. No. 33012, 247 Ill. App. 625. The cause was reversed and remanded for a new trial because the trial court improvidently instructed a verdict in favor of defendants. The pleadings are the same as when the case was first before us. They are recited in the opinion of this court and so are the material facts given in evidence upon the first trial. For such pleadings and recitation of facts we refer to the opinion *supra* without again reciting them here.

There was a trial before court and jury with a resulting verdict in favor of plaintiff and against defendants, with an assessment of damages in the sum of $5,000. Motions for a new trial and in arrest of judgment were made and denied, and a judgment entered upon the verdict for the amount thereof, and defendants appeal.

Defendants assign and argue for reversal the denial of defendants' motion in arrest of judgment on the ground that

[illegible]

Opinion filed April 17, 1959

[illegible]

the court.

This cause is here for the second time, the first time having it by this court in an opinion rendered down in June [illegible] and remanded for a new trial because the trial judge improperly instructed a verdict in favor of defendants. The pleadings are the same as when the case was first before us. They are recited in the opinion of this court and so are the material facts given in evidence upon the first trial. For such pleadings and recitation of facts reference is made to the opinion [illegible] without again reciting them here.

There was a trial before [illegible] resulting verdict in favor of plaintiff and against defendants, with an assessment of damages in the sum of [illegible]. Motions for a new trial and in arrest of judgment were made and denied, and a judgment entered upon the verdict for the [illegible] and defendants appeal.

Defendants contend [illegible] of defendants' motion in arrest of judgment on the ground that

plaintiff's declaration was materially defective, in that it did not allege that plaintiff was ready, able and willing to perform his part of the agreement; that it did not show that plaintiff had been damaged by the alleged breach; that the court erred in denying defendant's motion for an instructed verdict made at the close of the case; that there is no competent evidence in the record of any damage to the plaintiff; error in giving instruction 2, 3 and 4 tendered by plaintiff, and in refusing to give instructions 1 and 2, tendered by defendants; error in permitting the introduction of plaintiff's exhibits 3, 4, 5, and 6, and in not requiring plaintiff to elect to proceed either under the first or second count of the declaration.

The first movement of defendants upon entering into the trial now before us was their motion to require the plaintiff to elect to proceed under the first or second count of the declaration. The declaration is the same as that under which the first trial was had. We think after that trial and after the hearing in this court the motion came too late. The parties had made no former objection to either of the counts of the declaration, nor had a motion been made to require plaintiff to elect as to which count he would proceed under in the trial of the case. No notice was ever given before the trial of the intention of defendants to make such a motion. The issues stood in the instant trial as they did upon the first trial. To allow or not to allow the motion rested in the sound discretion of the court, and we cannot say under all the circumstances that the court abused such discretion in denying the motion. Moreover we are of the opinion that both counts were germane to the issues as developed by the testimony; that both count upon the tortious actions of the defendants. Furthermore, if it can be said that there was error in such ruling, we think such error, if error it

plaintiff's declaration was materially defective, in that it did not allege that plaintiff was ready, able and willing to deliver his part of the agreement; that it did not show that plaintiff had been damaged by the alleged breach; that the court erred in denying defendant's motion for a new trial; and that the verdict was at the close of the case; that there is no competent evidence in the record of any damage to the plaintiff; error in giving instruction 2, 3 and 4 tendered by plaintiff, and in refusing to give instructions 1 and 2, tendered by defendants; error in permitting the introduction of plaintiff's exhibits 1, 2, 3, and 5, and in not requiring plaintiff to elect to proceed either under the first or second count of the declaration.

The first argument of defendants upon entering into the trial now before us was their motion to require the plaintiff to elect to proceed under the first or second count of the declaration. The declaration is the same as that under which the first trial was had. We think that the trial and after the hearing in this court the motion came too late. The parties had made no former objection to either of the counts of the declaration, nor had a motion been made to require plaintiff to elect as to which count he would proceed under in the trial of the case. No notice was ever given before the trial of the intention of defendants to make such a motion. The issues tried in the instant trial as they did upon the first trial. To allow or not to allow the motion raised in the second discussion of the court, and we cannot say under all the circumstances that the court abused such discretion in denying the motion. Moreover we are of the opinion that both counts were germane to the issues as developed by the testimony; that both count upon the portions actions of the defendants. Furthermore, if it can be said that there was error in such ruling, we think such error, if error it

be, was cured by the verdict. It was held in C. & A. R. R. Co. v. Murphy, 196 Ill. 462, that while it is improper to join in the same declaration for personal injuries a count against two defendants with a count against each of them severally, still under the fifth clause of section six of the statute of Amendments and Jeofails such misjoinder, being a "mispleading" as the term is used in the statute, is not ground for a motion in arrest of judgment after verdict.

Even were the ruling erroneous, it was cured by the verdict.

It was not necessary to charge in the declaration plaintiff's readiness, willingness and ability to perform the contract on his part. The action is for a tort. The tort was alleged in the declaration and proven upon the trial with the resulting judgment. This covered every essential requirement.

There is an abundance of evidence showing that Mackie represented defendants, for as said in the former opinion of this court:

> "The evidence of E. H. Sheppley himself shows that Mackie was a salesman for the defendants until late in May, 1924, and that after June 10, 1924, he gave Mackie the privilege of staying there in the office until he paid up certain money that he, Sheppley, had advanced for him; that Mackie occupied an office with the defendants until sometime in 1925, the exact date of which he did not remember;"

and the evidence abundantly shows that defendant E. H. Sheppley took an active part in the negotiations between Mackie and plaintiff. E. H. Sheppley expressed his willingness to hold the title until Chapin paid the commission, and when that was done to reconvey the property to plaintiff. E. H. Sheppley held the deed and at that time plaintiff asked him where the

be, was moved by the verdict. It was only in [illegible] v. [illegible], 1[illegible] Ill. [illegible], that [illegible] in [illegible] the [illegible] defendants [illegible] under the [illegible] transferable and [illegible] as the [illegible] in arrest of judgment after verdict.

Even were the ruling [illegible], it not [illegible] verdict.

It was not necessary to [illegible] plaintiff's [illegible] contract on his part. The [illegible] alleged in the [illegible] resulting judgment. This [illegible]

There is no evidence of [illegible] defendants, for as said in the lower [illegible] this court:

> "The evidence of L. H. Dougherty plainly shows that Dougherty was a witness for the defendants until late in May, 1918, and that after June 12, 1918, he was merely the privilege of staying there in the office until he will go certain some day that he, Dougherty, had attempted for him, that Dougherty had an office with the defendants until September 1918, the exact date of which he did not remember;"

and the evidence absolutely shows that defendant L. H. Dougherty took an active part in the negotiations between Dougherty and plaintiff. L. H. Dougherty expressed the willingness to hold the title until Chapin had the commissions, and then was to have to receive the property to plaintiff. L. H. Dougherty held the deed and at that time practically asked him where the

abstract was. He replied that it was not here but that he should have the abstract, and plaintiff left him saying, "I will be up in a few days and you look it up." Thereafter plaintiff returned and asked for the abstract, and E. H. Sheppley replied, "Well, you should have it, I am going to hold you responsible for it." The sale was closed in Sheppley Bros. office; that on the office door was the name Sheppley Brothers Realty Company, no other name was on the door; plaintiff wrote down to Piqua, Ohio, and got information; that he went down to Sheppley Brothers and saw and talked to both G. [illegible] and E. H. at the same time, said that this property had been conveyed to another party and that there was a mortgage of $2500 placed on it; that he asked how that came about, and he said, "We did not know anything about that", and then said "we will look into the matter", and nothing further was said. He asked E. H. Sheppley if the deed signed to Douglas S. Dunn was recorded, and he said that he had neglected to record it at the time. Plaintiff testified that his rooming house sold for $35,000. that he was to get $5000 for his equity. The Piqua, Ohio, property was at no time conveyed to him, and he was not paid a penny of the $5000 by anybody.

There is an abundance of admissible evidence which, if the jury believed, is sufficient to support the verdict for the plaintiff. That Mackie was the agent of defendants was a question of fact for the jury and the jury upon competent evidence found that he was. It is significant that defendants did not put Mackie upon the witness stand to contradict the testimony of plaintiff regarding such agency. Even from the testimony of the defendants it may be gathered that Mackie was their agent, because it was admitted that Mackie was in their office, that he was

absence was. He replied that it was not here but that he should have the abstract, and immediately left his writing, "I will be up in a few days and you look it up." Interrogated Plaintiff returned and asked for the abstract, and C. C. McCloy replied, "Well, you should have it, I am going to hold you responsible for it." The mile was closed in Chancery Court, that is the office door was the same Chancery Court. Shortly thereafter, he other came out of the door, plaintiff went down to Ripley, Ohio, and put information that he went down to Chancery records and saw and asked to look at C. and E. at the same time, and that this transcript has been conveyed to another party and that there was a mortgage of $8500 issued on it; that he asked for that case about, and he said, "I did not know anything about that", and then said he will look into the matter", and nothing further was said. He asked C. C. Chancery if the deed signed to Dunlap or Dunlap was recorded, and he said that he had neglected to record it at the time. Plaintiff testified that his residence house and lot, that he was to get $500 for his equity. The Ripley, Ohio, property was at no time conveyed to him, and he did not hold a penny of the $500 by mortgage.

There is no evidence of material in evidence which, if the jury believed, is sufficient to support the verdict for the plaintiff. That Dunlap was the agent of defendant was a question of fact for the jury and the jury upon conflicting evidence found that he was. It is significant that defendant did not go upon the witness stand to contradict the testimony of plaintiff regarding such agency. Even from the testimony of the defendants it may be gathered that Dunlap was their agent, because it was admitted that Dunlap was in their office, that he was

working for them on commission, and that the commissions were divided 50-50, and the transaction in question was one that Mackie brought into the office. The evidence so established in the two trials in the Superior Court. This being true, it is immaterial whether the act of misfeasance, the gravamen of the suit, was committed by Mackie, the agent, or by the defendants. They are responsible in either event.

A chronological statement of the events culminating in plaintiff's being defrauded by defendants is in brief as follows:

In March, 1924, plaintiff sought to purchase a rooming house and in negotiations carried on by him in the course of completing such purchase dealt with the defendants and their agent, Mackie, the result of which was that plaintiff purchased a rooming house on Kenmore Avenue, Chicago. In January, 1925, he returned to the defendants' office for the purpose of having them sell the rooming house, and arranged with defendants for a sale by exchanging the rooming house for property in Piqua, Miami County, Ohio, owned by Mrs. Sarah A. McNeeley. In these negotiations he dealt with the defendants and their agent, Mackie. Mrs. McNeeley owned a house and lot in Piqua, Ohio, where she had formerly lived; she answered a "blind ad" of defendants and received a reply from them the result of which was that it was agreed by plaintiff to accept from Mrs. McNeeley her Piqua property as an even exchange for his Chicago rooming house. At the suggestion of the defendants, acting through Mackie, their agent, the title to the McNeeley Piqua property was taken in the name of one Douglas G. Gunn, who it was agreed should hold the title until plaintiff paid a $300 commission for the sale of his rooming house. The deed was made to Gunn and left with the agent, Mackie, for the defendants, and Mackie gave the deed to

working for them on commission, and that the commissions were divided 50-50, and the transaction in question was one that Hoskin brought into the office. The evidence is substantial in the two trials on the question here. This being true, it is immaterial whether the act of defrauding, the gravamen of the suit, was committed by Hoskin, the agent, or by the defendants. They are responsible in either event.

A chronological statement of the events culminating in plaintiff's being defrauded by defendants is about as follows:

In March, 1926, plaintiff sought to purchase a rooming house and in negotiations carried on by him in the course of completing such purchase dealt with the defendants and their agent, Hoskin, the result of which was that plaintiff purchased a rooming house on [illegible] Avenue, Chicago. In January, 1927, he returned to the defendants' office for the purpose of having them sell the rooming house, and arranged with defendants for a sale by exchanging the rooming house for property in Kent, Kent County, Ohio, owned by Mrs. Sarah L. Koskelly. In these negotiations he dealt with the defendants and their agent, Hoskin. Mrs. Koskelly owned a house and lot in Kent, Ohio, where she had formerly lived; she answered a "blind ad" of defendants and received a reply from them the result of which was that it was agreed by plaintiff to accept from Mrs. Koskelly her Kent property in an even exchange for his Chicago rooming house. At the suggestion of the defendants, acting through Hoskin, their agent, the title to the Koskelly Kent property was taken in the name of one Gordon L. Dean, who it was agreed should hold the title until plaintiff sold a [illegible] consideration for the sale of his rooming house. The deed was made to Dean and left with the agent, Hoskin, for the defendants, and plaintiff gave him deed to

the defendant E. H. Sheppley. It was agreed that Sheppley should immediately record the deed. Soon thereafter Mackie presented the deed to Mrs. McNeeley and her husband stating that there was error in the first deed and procured the McNeeleys to execute a second deed to one Viola Klauer. The second deed to Klauer was immediately recorded and a mortgage placed upon the property by Viola Klauer to secure the sum of $2500. All of this was done without the knowledge or consent of plaintiff. The resulting damage to plaintiff was the loss of $5,000 which was the value of the Piqua, Ohio property.

Defendants argue that there is no proof of damage to plaintiff. However, the damage is the value of the Piqua property which was utterly lost to plaintiff, and Mrs. McNeeley, who qualified as a judge of values of Piqua real estate, testified that the property was of the value of $5,000. No further evidence of value was either proferred or received.

On the question of value, the following occurred after the close of all the evidence.

> "The Court: Let the record show the case is re-opened for the purpose of (out of hearing of jury) allowing the testimony of Mrs. McNeeley as to the value of the Ohio property to go to the jury.
>
> "Mr. Becker: Defendants, by their attorneys, stipulate and admit that if Mrs. McNeeley was questioned, placed on the witness stand, that she would testify that in her opinion the Piqua, Ohio, property had a value of $5,000.
>
> "The Court: Is that the stipulation you want in this record?"

Mr. Levy, counsel for plaintiff, answered "yes".

In this state of the record there can be no question about the value of the Piqua property, and that value of $5,000

the defendant i. e. Wagley. It was agreed that Lawyer should immediately record the deed. Then Grantor quite promptly the deed to Lee, Wagley and her husband, stating that there was error in the first deed and requested the substitute to execute a second deed to Lee Flint Elkner. The second deed to Elkner was immediately recorded and a mortgage placed upon the property by Flint Elkner to secure the sum of $[illegible]. At of this was done without the knowledge or consent of plaintiff. The resulting damage to plaintiff was the loss of $[illegible] and the value of the farm, this property.

Defendants urge that there is no proof of damage to plaintiff. However, the judge is the value of the farm property which was wrongly lost to plaintiff, and Mr. Wagley, who qualified as a judge of values of farm real estate, testified that the property was of the value of $[illegible]. No further evidence of value was either proffered or received.

On the question of value, the following occurred after the close of all the evidence.

> "The Court: Let the record show the case is now opened for the purpose of (out of hearing of jury) eliminating the testimony of Mr. Wagley as to the value of the property to be the case here.
>
> "Mr. Wagley: Defendants, by their attorney, stipulate and admit that in the October term [illegible], filed on the [illegible] that the world [illegible] in her drawing the farm, this property had a value of $[illegible].
>
> "The Court: Is that the stipulation you want in this record?"

Mr. Levy, counsel for plaintiff, answered "yes".

In this state of the record there can be no question about the value of the farm property, and that value is $[illegible]

was the extent of the damage suffered by plaintiff by reason of the tortious conduct of defendant.

At the close of the proofs there was evidence warranting the court in submitting the case to the jury, and in denying defendants' motion for an instructed verdict in their favor.

We find no reversible error in the giving of instructions 2, 3 and 4 at the request of plaintiff. The motion for a new trial was in writing, and the objections were made to instructions 2 and 4. Instruction number 3 is not open to the criticism made and does not constitute reversible error.

As to defendants' refused instructions 1 and 3, these instructions were clearly erroneous. Number 1 instructed the jury that the damages sustained by plaintiff as the result of the breach of the agreement by defendants in failing to record the deed are too remote and such as could not reasonably have been within the contemplation of the parties, and such as could not have been anticipated by the parties in the usual course of events, "then the defendants are not liable". The defendants were liable to plaintiff in damages not such as might have been in contemplation of the parties, but such as the law would award under the proofs of fraud contained in the record. Defendants are liable for damages caused by their tortious acts. These acts resulted in the plaintiff's losing the Pious, Ohio, property, which was indisputedly of the value of $5000.

Instruction number 2 told the jury that unless plaintiff proved that he had complied with all the terms and conditions of the alleged contract with said defendants and tendered the money due to them under the terms of the contract, plaintiff could not recover. The action was for tort and not under any contract,

ras the extent of his damage suffered by plaintiff by reason of the tortious conduct of defendant.

At the close of the proofs there was evidence warranting the court in submitting the case to the jury, and in denying defendants' motion for an instructed verdict in their favor.

We find no reversible error in the giving of instructions B, 3 and 4 at the request of plaintiff. The motion for a new trial was in writing, and the objections were made in instructions B and 4. Instruction number 3 is not open to the criticism made and does not constitute reversible error.

As to defendants' refused instructions 1 and 2, these instructions were clearly argumentative. Number 1 instructed the jury that the damages sustained by plaintiff as the result of the breach of the agreement by defendants is limited to those the deed are too remote and such as could not reasonably have been within the contemplation of the parties, and such as could not have been calculated by the parties to the usual course of events, "then the defendants are not liable". The defendants were liable to plaintiff in damages not such as might have been in contemplation of the parties, but such as the law would regard under proofs of first sustained in the record. Defendants are liable for damages caused by their tortious acts. These acts resulted in the plaintiff's losing the place, site, property, which was indisputably of the value of $2000.

Instruction number 2 told the jury that unless plaintiff proved that he had complied with all the terms and conditions of the alleged contract with said defendants and tendered the money due to them under the terms of the contract, plaintiff could not recover. The action was for lost and not under any contract.

and for the damage which arose from the tortious acts of the defendants in procuring a surrender by fraudulent representations of the deed first given to the Piqua, Ohio, property, and by the fraudulent representations securing a second deed of the property to Viola Klauer. Furthermore, the jury were, in other instructions given, sufficiently instructed upon the law applicable to every material phase of the case.

The main objection to plaintiff's exhibits 3, 4, 5 and 6, which consisted of certified copies of deeds conveying the Piqua, Ohio, property, is that they are not originals. We think in the circumstances of this case the certified copies of the deeds made by the recorder of Piqua, Ohio, were the best evidence available to plaintiff, and we might assume that the originals were, if not in the possession, within the control of the defendants, who might have produced them as the best evidence. As secondary evidence these exhibits were properly admissible.

There was no specific objection made to these exhibits, The objections were general. Clowry v. Holmes, 170 Ill. App. 135.

Exhibit 5 was a certificate of the Secretary of State of Ohio, that the exhibits were properly and duly certified by the recorder. It was an original document and required no other proof for its indentification. In Gillespie v. Gillespie, 159 Ill. 84, it is said:

> "Objection is made that the copy of the deed in question should not have been admitted in evidence. If it was claimed, upon the hearing, that the proper foundation for the introduction of parol evidence of the contents of the instrument had not been laid by proving that the original could not be found, then specific objection should have been made, so that the cross-complainant could have had the opportunity to supply the wanting proof. No such objection was made."

and for the lessons which arose from the further case of the defendant in securing a verdict by producing witnesses of the deed from later to the [illegible], [illegible], to wit, [illegible] testimony concerning a second deed of the [illegible] to this [illegible]. Furthermore, the jury were, in [illegible] other instructions given, sufficiently instructed upon the law applicable to every material issue of the case.

The main objection to plaintiff's exhibits 2, 3, 8 and 9, which consisted of certified copies of deeds conveying the [illegible], this, strictly, is not [illegible]. In order to the introduction of this upon the original suits of the deeds made by the [illegible] of [illegible], were the best evidence available to plaintiff, and -- might seem that the objection here, if not to the admission, within the control of the defendants, who might have produced them as the best evidence. At secondary evidence their exclusion was [illegible].

There was no proper objection made to these exhibits. The objections were general. Lowry v. Holmes, [illegible] Ill. [illegible].

Exhibit 5 was a certificate of the secretary of state of Ohio, that the articles were correct and duly certified on the records. It was an official document and admissible on other proof for its identification. In Gilchrist v. Schlichter, [illegible] Ill. 64, it is said:

> "Objection is made that the copy of the deed in question should not have been admitted in evidence. If it was admitted, upon the hearing, then the proper foundation for the introduction of such evidence of the execution of the instrument had not been laid by showing that the original could not be found, that specific diligence should have been made, so that the opposite party could have had the opportunity to supply the missing link, to such objection was made."

Furthermore all of the foregoing exhibits do not appear in the bill of exceptions, and as held in North Side Door & Sash v. Schuetz, 189 Ill. App. 379, the sufficiency of the missing documents to justify the finding of the trial court will be presumed.

Finding no reversible error committed by the trial court, the judgment of the Superior Court is affirmed.

AFFIRMED.

WILSON AND RYNER, JJ., Concur.

Furthermore, all of the foregoing testimony is not against the grain of evidence, and we hold in light of Ex Parte A. Leah v. Johnson, 139 Ala. 465, 472, the majority view of the minority concurred to justify the finding of the trial court will be reversed.

Finding no reversible error committed in the trial court, the judgment of the Superior Court is affirmed.

Affirmed.

Bishop and Merrill, JJ., concur.

33086

MORRIS F. KRAUS,
Appellee,
v.
RELIANCE COMPANY, INC.,
a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

252 I.A. 648

Opinion filed April 17, 1929

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This is an action upon a contract of employment, dated June 18, 1926, executed by plaintiff under seal and by the defendant by Samuel B. Schulman, its president, whereby plaintiff was employed as sales manager for a period of one year. The contract was terminable upon thirty days written notice by either party to the other before its expiration by limit of time. On July 26, 1926 defendant gave such a notice in writing to plaintiff terminating his contract thirty days after its date.

It was agreed inter alia that plaintiff should devote all of his time to the business of defendant as sales manager, and during such employment was not to engage in any other similar business; that plaintiff should have full control of the sales end of the business of defendant, and should hire and discharge salesmen and perform all duties incidental to the position of sales manager. It was agreed that plaintiff should receive as compensation for all sales brought in by him and accepted by defendant a sum equivalent to 3% of the contract price due and payable when the loan is opened, and, on all transactions which are secured by defendant, either through the efforts of salesmen employed by plaintiff or obtained by defendant in the usual

Opinion filed April 17, 1938

Mr. Justice Burton delivered the opinion of the court.

This is an action upon a contract of employment, dated June 18, 1935, executed by plaintiff under seal and by the defendant by Robert L. Kaufman, its president, whereby plaintiff was employed as sales manager for a period of one year. The contract was terminable upon thirty days written notice by either party to the other before its expiration by lapse of time. On July 30, 1936 defendant gave such a notice in writing to plaintiff terminating his contract thirty days after the date.

It was agreed later that plaintiff should devote all of his time to the business of defendant as sales manager, and during such employment was not to engage in any other similar business; that plaintiff should have full control of the sales end of the business of defendant, and should hire and discharge salesmen and perform all duties incident to the position of sales manager. It was agreed that plaintiff should receive as compensation for all sales brought in by him and accepted by defendant a sum equivalent to 3% of the contract price and payable when the item is paid, and on all transactions which are secured by defendant, either through the efforts of salesmen employed by plaintiff or obtained by defendant in the usual

course of business, a sum equivalent to 1% of the contract price, the cost of financing the transaction to be excluded when computing the commission due and payable to plaintiff; that plaintiff should have a drawing account of $100 a week, such moneys to be deducted from other moneys due under the contract, and that plaintiff should not draw any money unless the commissions earned are sufficient to cover the sums being withdrawn by him. It was also agreed that defendant should pay to plaintiff, in addition to the foregoing commissions, the sum of $1,000 on a building being erected at Catalpa and Spaulding Streets, Chicago. And it was further agreed that all moneys theretofore drawn by plaintiff should be deducted from the commissions then or thereafter to be earned. It was further agreed that if the contract be terminated by either party before the expiration thereof, then plaintiff should receive his compensation on all business brought in, started or pending, at the time of such termination and payment, and payment should be made in accordance with the terms stipulated above, and defendant agreed to render a statement to plaintiff from time to time showing transactions involved and commissions due to him.

In defendant's affidavit of merits it was admitted that the contract between the parties was entered into, and by that affidavit it was recited in haec verba; admits also that defendant terminated the contract by a 30 day notice given to plaintiff on the 26th day of July, 1926, but denies that at that time there was due to plaintiff $685 or any other sum. Defendant sets out fifteen items, which it alleges plaintiff drew in accordance with the contract and which totalled $1860, and then there is set out two items of earnings, being the $1000 paid on the Catalpa and Spaulding Building, and $200 paid on the Miller building, and alleges that plaintiff overdrew his account in

course of business, a sum equivalent to 1% of the contract price, the cost of thinning the transmission to an existing cross-putting the connection due and payable on delivery; that plaintiff should have a drawing account of $150 a week, that amount to be deducted from other money due under the contract, and that plaintiff should not draw any money unless the commissions earned are sufficient to cover the sum being withdrawn by him. It was also agreed that defendant should pay to plaintiff, in addition to the foregoing emoluments, the sum of $4,000 on a building being erected at Sydney and Dundas, Toronto, which if the further agreed that all money therefore drawn by plaintiff should be deducted from the commissions then or thereafter to be earned. It was further agreed that if the company be terminated by either party before the completion thereof, then plaintiff should receive his commission on all business brought in, started or pending, at the time of such termination and payment should be made in accordance with the terms stipulated above, and defendant agreed to render a statement to plaintiff from time to time showing transactions involved and commissions due to him.

In defendant's affidavit of merits it was admitted that the contract between the parties was entered into, and by that affidavit it was received in [illegible] that defendant terminated the contract by a 30 day notice given to plaintiff on the 16th day of July, 1926, but denied that at that time there was due to plaintiff [illegible] or any other sum. Defendant made out fifteen items, which it alleges plaintiff has in accordance with the contract and which totalling $1500, and then there is set out two items of expenses, being the $1500 paid on the Ontario and Dundas Building, and $250 paid on the Miller building, and alleges that plaintiff overdrew his account in

excess of the commissions due him of $660, and claims that plaintiff was indebted to it in the latter sum.

There was a trial before court and jury and a verdict assessing plaintiff's damages at the sum of $7050. There is no recitation in the abstract that a motion for a new trial or in arrest of judgment was made. It does show, however, that a judgment on the verdict was entered, and the appeal now before us prayed and perfected.

Defendant assigns and argues for reversal that the court committed reversible error in refusing to admit Schulman's testimony tending to prove on behalf of defendant that Schulman entered into a contract with plaintiff before the execution of the contract of employment, whereby plaintiff had agreed to waive any commission on the McCormick deal if there was any loss to defendant, and a refusal to permit defendant Schulman to show that there was a loss; and in refusing to admit testimony that plaintiff was to secure his commissions in the Pleimling deal out of the second mortgage paper on the property, and that it was impossible to procure a second mortgage on the property; and in admitting testimony to show that after the Jones deal was entered into a new arrangement was made whereby plaintiff was to receive 2% instead of 1% as provided in his contract; in the giving of instructions at the instance of plaintiff, and in refusing to give certain instructions offered on behalf of defendant.

The material question for solution by the jury was the amount due plaintiff under the contract between the parties, about which contract and its terms all parties are in accord.

excess of the considerations due his of [illegible], and claims that plaintiff was indebted to it in the latter sum.

There was a trial before court and jury and a verdict assessing plaintiff's damages at the sum of [illegible]. There is no restriction in the contract that a motion for a new trial or in arrest of judgment was made. In view above, however, that a judgment in the verdict was entered, the judgment was before us prayed and performed.

Defendant assigns and argues for reversal that the court committed reversible error in refusing to admit defendant's testimony tending to prove on behalf of defendant that defendant entered into a contract with plaintiff before the execution of the contract of employment, thereby plaintiff had agreed to waive any commission on the contract and if there was any loss to defendant, and a tendency to permit defendant testimony to show that there was a loss; and in refusing to admit testimony that plaintiff was to secure his commission in the [illegible] that of the second mortgage paper on the property, and that it was impossible to procure a second mortgage on the property; and in admitting testimony to show that after the loss deal was entered into a new arrangement was made whereby plaintiff was to receive the interest of it be provided in his contract; in the giving of instructions at the instance of plaintiff, and in refusing to give such instructions offered on behalf of defendant.

The material questions for solution by the jury was the amount due plaintiff under the contract between the parties, about which contract the [illegible] [illegible] in evidence.

The evidence of both parties demonstrates that the compensation of plaintiff was fixed by the contract. In the light of the contract the court did not err in excluding proof of a verbal agreement between the parties made before the execution of the written contract, by which it was sought to prove that plaintiff agreed to waive any commission on the so-called McCormick deal if there was a loss thereon to defendant. The evidence does not show that defendant made any payment to plaintiff specifying on what account such moneys were paid as commissions. Such moneys were paid under the terms of the contract giving plaintiff the right to draw on account. The scale of payment of commissions to plaintiff was fixed by the contract, and it is an axiomatic principle of law that all verbal agreements made prior to the execution of the contract must be regarded as merged in the contract; and as held in Broxham v. Harrington, 197 Ill. App. 454, a written contract executed between the parties supersedes all prior negotiations, representations and agreements upon the subject. In Grubb v. Milan, 249 Ill. 456, it was held that in an action upon a written contract it is presumed that the contract contains the whole of the agreement and all specific conversations concerning the matter are merged in the agreement, and hence there can be no recovery of damages for a breach of the promise which is not a part of the contract.

The defendant under the contract kept the commission account between it and plaintiff, and therefore is presumed to have kept an accurate account of the deals under the contract in which plaintiff was entitled to be paid a commission thereunder. The president of defendant, Schulman, was called by plaintiff under Section 33 of the Municipal Court Act, and he testified in much detail regarding the deals in which plaintiff was entitled,

The evidence of both parties indicates that the cancellation of plaintiff was taken by the contract. In the light of the contract the court did not err in excluding proof of a verbal agreement between the parties made before the execution of the written contract, by which it was sought to prove that plaintiff agreed to waive any commission on the so-called contract that it might succeed in procuring to defendant. The evidence does not show that defendant made any payment to plaintiff specifically on that account and moneys were paid as commissions. Such moneys were paid under the terms of the contract giving plaintiff the right to deal on account. The mere if payment of commissions to plaintiff was fixed by the contract and it is an unlawful contract, it is law that all verbal agreements made prior to the execution of the contract must be regarded as merged in the contract, and as held in Jackson v. Bittinger, 147 Ill. 390, 401, a written contract executed between the parties embraces all prior negotiations, representations and agreements upon the subject. In Brown v. Allen, 180 Ill. 468, it was held that in an action upon a written contract it is presumed that the contract contains the whole of the agreement and all specific representations concerning the matter are merged in the agreement, and proof thereof may be no recovery of damages for a breach of the contract which is not a part of the contract.

The defendant under the contract sent the commission account between plaintiff and Guertin, and Guertin is presumed to have kept an account of the debit under the contract in which plaintiff was entitled to be paid a commission therefor. The president of defendant, Schlaver, was called by plaintiff under section 21 of the Municipal Court Act, and he testified in such detail, explaining the debits in which plaintiff was entitled,

and not entitled, to be paid a commission under the contract. This testimony was supplemented by witnesses Glasser, Paton, plaintiff Kraus, Pleimling, Sunberg and Pfeil. Against this defendant called Pfeil, plaintiff's witness, as its witness, one Schallman and the president of defendant, Samuel B. Schulman. An examination of the testimony of all these witnesses, in our opinion, amply sustains the verdict of the jury.

It was a question of fact for the jury, and if they believed plaintiff and his witnesses, and gave more weight to their testimony than to that of the witnesses for defendant, which we will assume they did, the verdict has an ample foundation on which to rest. It was patent that the witness Schulman, president of defendant, was not only a hostile witness, but that he was greatly interested in the defendant company, and in testifying claimed that he and the company were one. Schulman's testimony bore evidence of his hostility to plaintiff, which undoubtedly the jury observed, as they had a right to, and to take such hostility into consideration in weighing his testimony and in arriving at their verdict. Schulman testified that he knew plaintiff's witness Sunberg by seeing him on the street and "throwing him out of the office". No reason was assigned for this hostile action of Schulman, and it may be that his admitted violent conduct to Sunberg may have had the effect of impressing on the jury that he was hostile to the plaintiff. This was proper for the jury to take into consideration in determining what weight they would give Schulman's testimony.

The court did not err in refusing to receive evidence de hors the terms of the contract of the parties.

The question of commission under the McCormick deal was governed by the contract, and the court did not err in

and not entitled, to be paid a consideration under the contract. This testimony was supplemented by witnesses Jackson, Lucas, plaintiff Irwin, Lindsley, Sawyer and others, showing that defendant called Fred, plaintiff's eldest, to the witness, one Tobelmann and the contract of indemnity, Exhibit 1, Tobelmann. In consideration of the testimony of all these witnesses in our opinion, amply warrants the verdict of the jury.

It was a question of fact for the jury, and if they believed plaintiff and his witnesses, we can not weigh or their testimony thus to that of the witnesses for defendant, which we will assume they did, the verdict has an ample foundation on which to rest. It was argued that the witness Cowlman, president of defendant, was not only a hostile witness, but that he was greatly interested in the defendant company, and in testifying claimed that he had the company very one. Cowlman's testimony bore evidence of the hostility to plaintiff, which undoubtedly the jury observed, as they had a right to, and to take such hostility into consideration in weighing his testimony and in arriving at their verdict. Cowlman testified that he knew plaintiff's witness Sawyer by seeing him on the street and "knocking his owl of the office". No reason was assigned for this hostile action of Cowlman, and it may be that his admitted violent conduct to Sawyer may have had the effect of impressing on the jury that he was hostile to the plaintiff. This was proper for the jury to take into consideration in determining what weight they would give Cowlman's testimony.

The court did not err in refusing to receive evidence in bar the terms of the contract of the parties.

The question of consideration under the indemnity bond involved in the motions, and the court did not err in

refusing to permit Schulman to testify that he on behalf of defendant entered into a contract with plaintiff before the execution of the contract of employment, whereby plaintiff had agreed to waive any commission on the McCormick deal if there was a loss to defendant, and in refusing to permit Schulman to testify that there was such a loss. These observations are equally pertinent in regard to the commissions under the so-called Pleimling deal, as all prior and contemporaneous agreements are in law governed by the written contract.

There is nothing in the record to indicate that the instructions were given either in writing or orally. In the absence of such evidence we may assume under the Municipal Court Act that the instructions were given orally, as by that act permitted. The instructions so given stated clearly and sufficiently the law applicable to the facts before the jury. Furthermore no specific objection was pointed out to any of the given instructions. Consequently general objections made are not sufficient to preserve for our review the correctness of such rulings. As held in Pioneer Stock Powder Co. v. Washburn, 201 Ill. App. 361, general objections to the giving and refusing of instructions are not sufficient to preserve the correctness of such rulings thereon for review. Defendant's refused instruction, which contains the recitation that "the defendant is a competent witness" was properly refused, if for no other reason that that defendant being an artificial person and existing only in contemplation of law, could not testify.

The record discloses no reversible error before us for review, and the judgment of the Municipal Court is therefore affirmed.

Affirmed.

WILSON AND HYNES, JJ., CONCUR.

refusing to permit business to testify that he on behalf of defendant entered into a contract with plaintiff before the execution of the contract of employment, thereby indirectly had agreed to waive any complaint on the ground that if there was a loss to defendant, and in refusing to permit counsel to testify that there was such a loss. These observations are equally pertinent in regard to the contention under the so-called "claiming deal," as all prior and contemporaneous arrangements are in law covenanted by the written contract.

There is nothing in the record to indicate that the instructions were given either in writing or orally. In the absence of such evidence we are unable under the judicial doctrine that the instructions were given orally, or by that not permitted. The instructions as given stated simply and unqualifiedly the law applicable to the facts before the jury, instead more as specific objection was raised and to any of the given instructions. Consequently general objections made are not sufficient to preserve for our review the correctness of such rulings. As held in Lawler etcetera Lumber Co. v. Anderson, 271 Ill. App. 63, general objections to the giving and refusing of instructions are not sufficient to preserve the correctness of such rulings thereon for review. Defendant's refused instructions which contained the recitation that "you determine in a contested issue" are correctly refused, if for no other reason that such determination being an artificial person and existing only in contemplation of law, could not testify.

The record discloses no reversible error before us for review, and the judgment of the municipal court is therefore affirmed.

Affirmed.

Hudson and Wright, JJ., concur.

33095

SAMUEL G. ALPORT

Appellee,

v.

ATLAS ASSURANCE COMPANY, LTD., of London, England,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

252 I.A. 648[4]

Opinion filed April 17, 1939

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This is a suit of the fourth class in the Municipal Court, brought to recover upon an insurance policy issued by defendant and delivered to plaintiff, for a collision between his automobile and that of another, in which plaintiff's automobile was damaged, and for the alleged damage to the property of another caused by the action of plaintiff, and expenses incurred by plaintiff in an action for damages brought against him, the amount claimed being $294.36.

Defendant filed its affidavit of merits in which it denied substantially all the averments of plaintiff's statement of claim, the fourth paragraph of which, claiming that the suit was not commenced within twelve months of the accruing of the cause of action, as provided in the insurance policy, etc., was stricken by the court. To this action of the court the defendant made no objection.

There was a submission of the cause by agreement of the parties with a finding of the issues in favor of plaintiff and an assessment of damages at the sum of $294.36. After overruling defendant's motions for a new trial and in arrest of judgment there was a judgment entered upon the finding and

Judge

[illegible] v. [illegible]

Appellee.

[illegible]

[illegible] County, [illegible]
of Lumber, [illegible]

Appellants.

Opinion filed April 17, 1939

[illegible] the opinion
of the court.

This is a suit of the fourth class in the Circuit Court, brought to recover a certain policy issued by defendant and delivered in Illinois, for a collision covering his automobile and that of others, in which plaintiff's automobile was damaged, and for the alleged damage to the property of another owner by the action of plaintiff, and impleaded interested by plaintiff in an action for damages through against him, the sums of [illegible] being [illegible].

Defendant filed its affidavit of merits in which it denied substantially all the averments of plaintiff's statement of claim, the fourth paragraph of which, denying that the suit was not commenced within twelve months of the accruing of the cause of action, as provided in the insurance policy, was, on motion by the court. In this action of the court the defendant made no objection.

There was a submission of the cause by agreement of the parties with a finding of the issues in favor of plaintiff and an assessment of damages at the sum of [illegible]. After overruling defendant's motions for a new trial and in arrest of judgment there was a judgment entered upon the finding and

and defendant brings the record here for our review by appeal.

In the trial of the case plaintiff offered in evidence the policy of insurance issued by the defendant to plaintiff, together with the riders thereon, including the rider which covered the risk for which the judgment in this case was procured. Before the accident in question plaintiff wrote to defendant's agent requesting additional coverage against all risks of damage to the car exceeding $50. It was stated in the letter that "I am leaving for my vacation and want to have same covered from today." The broker to whom the letter was addressed complied by making endorsements attached to the policy previously issued, which were executed in compliance with the application. It was also proven that the premium was pro rated from July 3, 1925, and covered the risk in accordance with the application and from the date hthereof.

It further appears from the evidence that immediately upon plaintiff's return to Chicago he interviewed defendant's agent and informed him of the accident, and said to him, "Am I covered or am I not covered?", to which the agent replied, "Everything will be all right and the general office notified." Proof of loss was made in due time in accord with the terms of the policy, and a statement of loss was made and forwarded to the defendant. Many conferences were had in the Chicago office of defendant regarding the claim, exceeding a period of two months. Defendant by letter dated October 2, 1925, rejected plaintiff's claim and gave as a reason therefor that the claim arose before notice of coverage was received by its agents and on that account it denied its liability.

The record shows that defendant proffered no defense

the defendant brings the record here for our review on appeal.

In the trial of the case plaintiff offered in evidence the policy of insurance issued by the defendant to plaintiff, together with the riders thereon, indicating the rider which covered the risk for which the judgment in this case was recovered. Before the accident in question plaintiff wrote to defendant's agent requesting additional coverage against all risks of damage to the car exceeding $50. It was stated in the letter that "I am leaving for my vacation and want to have same covered from today." The letter to which the letter was addressed consisted by making endorsements attached to the policy respectively issued, which were endorsed in compliance with the application. It was also proven that the premium was paid for one day "1, 1938, and covered the risk in accordance with the application and from the date thereof.

It further appears from the evidence that immediately upon plaintiff's return to Chicago he informed defendant's agent and informed him of the accident, and said to him, "am I covered or am I not covered?", to which the agent replied, "Everything will be all right and the general office notified." Proof of loss was made in due time in accord with the terms of the policy, and a statement of loss was made and forwarded to the defendant. Many conferences were had in the Chicago office or telephone regarding the claim, concerning a medical of the auto. Defendant by letter dated October 7, 1938, rejected plaintiff's claim and gave as a reason therefor that the claim arose before notice of coverage was received by the agents and on that account it denied the liability.

The record shows that defendant realleged no defense

denying that the accident happened as claimed or made any issue upon the payment of the sums expended by plaintiff as a result of the accident, as set forth in his statement of claim. Neither is it denied that the insurance, as written, was accepted by the plaintiff and paid for in accord with the application. It is further in proof that plaintiff paid the premium to defendant's agent for coverage from July 3rd, which it has retained and never offered to return to plaintiff. In other words, defendant took no action to restore the status quo which existed before the payment of the additional premium and the occurrence of the accident. By retaining the premium after knowledge of the accident and due notice thereof given by plaintiff, it impliedly assumed the obligation for the additional coverage for which the premium was paid and received.

The evidence of plaintiff fully sustains his claim, both as to the accident, the time when it occurred, and the fact that it did occur after the defendant company had accepted such additional risk and evidenced the same by its rider duly executed and attached to the original policy of insurance.

Defendant proffered no evidence disproving the plaintiff's contention and his evidence supporting the same, that his accident in question occurred July 4, 1925. The testimony of plaintiff sustained his claim as to the amounts disbursed by him as a result of the accident, and there is no evidence successfully challenging any of such disbursements.

This is an action of the fourth class and is what the evidence makes it without regard to the pleadings. Obermeyer v. Wisconsin Dairy Co., 211 Ill. App. 213. The case was tried upon its merits and every claim of plaintiff was successfully sustained by competent evidence heard in support of his claim.

denying that the accident happened as alleged or even any injury upon the payment of the sums demanded by plaintiff as a result of the accident, as the fact is in the statement of claim. Neither in it denied that the insurance, as written, was accepted by the plaintiff and paid for in accord with the agreement. It is further in proof that plaintiff said the premium to defendant's agent for insurance from July 1st, which it has retained and never offered to return to plaintiff. In other words, defendant took no action to rescind the status quo which existed before the payment of the additional premium and the occurrence of the accident. By retaining the premium after knowledge of the accident and due notice thereof given by plaintiff, it tacitly waived the condition for the additional coverage for which the premium was paid and received.

The evidence of plaintiff fully sustains his claim, both as to the accident, the time when it occurred, and the fact that it did occur after the defendant company had received most additional pay and authorized the same by its rider duly executed and attached to the original policy of insurance.

Defendant produced no evidence disproving the plaintiff's contention and his evidence supporting the same, that his accident in question occurred July 4, 1942. The testimony of plaintiff sustained his claim as to the premium tendered by him as a result of the accident, and there is no evidence successfully challenging any of such statements.

This is an action of the fourth class and is what the evidence makes it without regard to the pleadings. Dorrance v. Kingsbury Duty Co., 211 Ill. App. 511. The case was tried upon its merits and every claim of plaintiff was successfully sustained by competent evidence heard in support of his claim.

Defendant argues upon the false premise that the rider on the policy was not effective at the time of the accident. The proof not only shows to the contrary, but there is nothing in the record which sustains defendant's unsupported contention. The sufficiency of the rider on the policy in question in suit to cover the accident for which compensation was sought thereunder, is sustained in Cottingham v. National Mutual Ins. Co. 209 Ill. App. 557, affirmed 290 Ill. 26. The trial being before the court without the intervention of a jury, we will assume that the findings of the court are based upon the admissible evidence found in the record, and we find an abundance of evidence which sustains such findings.

Defendant preserved no objection to the order striking the fourth paragraph from its affidavit of merits. Therefore there was no error in the court's denying to defendant the right to introduce evidence of the facts therein stated.

There is neither merit in law or fact supporting defendant's defense. Neither is there any error justifying a reversal of the judgment of the Municipal Court. Therefore the judgment is affirmed.

AFFIRMED.

WILSON AND RYNER, JJ., CONCUR.

Defendants argued from the first proposition that the ruling on the policy was not effective at the time of the accident. The jury not only found to the contrary, but there is nothing in the record which supports defendants's unsupported contention. The sufficiency of the claim on the policy in question is not to never the incident for which compensation was sought thereunder, is resolved in Prentiss v. National Auxil Ins. Co. 209 Ill. App. 487, affirmed 140 Ill. 40. The trial being before the court without the intervention of a jury, we will assume that the findings of the court are based upon the admissible evidence found in the record, and we find in abundance of evidence which sustains such findings.

Defendants preserved no objection to the court striking the fourth exception from its affidavit of merits. Therefore there was no error in the court's ruling in striking at the right to introduce evidence of the facts therein stated.

There is neither merit in law or fact supporting defendant's defense. Neither is there any error justifying a reversal of the judgment of the municipal court. Therefore the judgment is affirmed.

Affirmed.

Lewis and Fyke, JJ., concur.

32966

EDWARD M. WILLOUGHBY, et al., etc.,
Appellee,
v.
JAMES W. STEVENS,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

252 I.A. 648

Opinion filed April 17, 1929

MR. JUSTICE HYNES delivered the opinion of the court.

The defendant, James W. Stevens, owned an undivided one-half interest in a valuable long-term lease of a building and lot situated on the west side of Clark street between Madison and Monroe streets in the City of Chicago, known as the "Arcade" property. His son, Raymond Stevens, and O. J. Arnold, a resident of the City of Minneapolis, Minnesota, each owned a one-quarter interest. The land and building adjoining immediately upon the west were owned by the National Life Insurance Company. The defendant was the chairman of the board of directors of the Illinois Life Insurance Company and his son had been identified with him for a long period of years in the management of that Company. Arnold was the President of the Northwestern National Life Insurance Company.

The plaintiffs were duly licensed real estate brokers, operating in the City of Chicago. In the transaction involved in this appeal they were represented by Fred J. Tucker. They claim that in the early part of the year 1927, the defendant agreed with Tucker to sell the property in question for a consideration of $350,000.00 cash and to pay a commission of $20,000.00 provided he could obtain the consent of his co-owners; that the defendant secured such consent and that Tucker, acting for the plaintiffs, produced a buyer ready, willing and able to purchase in accordance with the terms agreed upon.

Opinion filed April 17, 1929

Tucker presented a contract to the defendant executed by the proposed purchaser but the defendant and his co-owners refused to sign the contract or to pay the commission. The plaintiffs brought suit in the Superior Court of Cook County, where a jury trial was had, resulting in a verdict in their favor and judgment upon the verdict for the full amount of the commission claimed. The defendant took this appeal.

The defendant insists that the judgment should be reversed for the reasons that he never agreed to sell for a consideration of $350,000.00; that at no time did he contract to pay a commission for a sale at that price; that it was the express understanding that there should be no liability on his part except in the event that Arnold would consent to a sale and join in a conveyance; that the plaintiff should be barred from recovery because their agent, Tucker, was false to his trust in that, as broker for the defendant, he concealed from his principal the fact that the real prospective purchaser was the National Life Insurance Company, and that, without disclosing the fact, he acted in the dual capacity of broker for both the defendant and the proposed purchaser.

Tucker testified that during a period of three or four years immediately prior to January, 1927, he talked to the defendant many times about the sale of the leasehold and had interested several different parties as prospective purchasers; that on the thirteenth or fourteenth of February, 1927, he told the defendant that if he was given two or three days time he thought he could sell the property for $350,000.00, cash, to which the defendant replied that he was willing to sell at that price but that he would have to take the matter up with his

Walker presented a contract to the defendant executed by the proposed purchaser but the defendant and his co-owners refused to sign the contract or to buy the property. The plaintiffs brought suit in the superior court of Cook County, where a jury trial was had, resulting in a verdict in their favor and judgment upon the verdict for the full amount of the commission claimed. The defendant took this appeal.

The defendant insists that the judgment should be reversed for the reasons that he never agreed to sell for a consideration of $250,000.00; that at no time did he contract to pay a commission for a sale at that price; that it was the understanding that there should be an identity in the part exact in the event that Israel would commence to a sale and join in a conveyance; that the plaintiff should be barred from recovery because their agent, Walker, had taken as his fee in that, as broker for the defendant, he concealed from his principal the fact that the real prospective purchaser was the Metropol Life Insurance Company, and that, without disclosing the fact, he acted in the dual capacity of agent for both the defendant and the proposed purchaser.

Walker testified that during a period of three or four years immediately prior to January, 1927, he talked to the defendant many times about the sale of the Greenhill and had interested several different parties as prospective purchasers; that on the thirteenth or fourteenth of January, 1927, he said the defendant that if he was given two or three days time he thought he could sell the property for $250,000.00, to which the defendant replied that he was willing to sell at that price but that he could have to take the matter up with his

associates; that the defendant expressed his satisfaction with a commission of $20,000.00, but asked Tucker not to say anything to the proposed purchaser until he, the defendant, had had an opportunity to confer with his co-owners; that on the evening of the same day or the next morning the defendant telephoned him that he could proceed with the sale as his associates had agreed to sell at the price of $350,000.00; that the next morning a contract signed by Stacy C. Mosser as purchaser was presented to the defendant who turned the contract over to his attorney, Hugh T. Martin, for examination; that the latter suggested certain changes which were made; that when the contract was returned to him the defendant said that it had all of the ear-marks of the National Life Insurance Company because Mosser's firm had sold an issue of bonds for that Company but that when he was asked what that had to do with the matter he replied that it had nothing to do with it except that it just happened to fit in; and that the defendant telephoned his son the information about Mosser and his connection with the National Life Insurance Company.

At the close of this meeting the defendant delivered the abstracts of title to the property to his lawyer, Martin, and Tucker. He directed them to go in his automobile to the offices of the Chicago Title and Trust Company and order a continuation of the abstracts. He told Martin to put some pressure on the company to obtain prompt action as he wanted the deal closed by the first of the month. These instructions were carried out and Martin signed a continuation order with directions that the abstracts, when ready, be delivered to the plaintiffs. The continuation was completed in three days.

Later in the same day the defendant advised Tucker

reasoning; that the defendant or respondent his partnership with a capitalization of $50,000.00, but would further not be entitling to the proposed recovery until he, the defendant, had begun unconditionally to confer with his co-worker; that on the evening of the same day or the next morning the defendant informed him that he could proceed with the sale on his understanding that agreed to sell at the price of $100,000.00; that the next morning a contract signed by Harry S. Lesser as principal was presented to the defendant who turned the property over to his attorney, Hugh T. Martin, for consideration; that the lawyer suggested certain changes which were made; that also the contract was returned to him the defendant said that it had all of the approval of his national title insurance company because Lesser's firm had said on issue of bonds for that company but that when he was asked what that had to do with the matter he replied that it had nothing to do with it having that of just happened to fit in; and that the defendant informed the sale the information about Lesser and his connection with the National Title Insurance Company.

At the close of this meeting the defendant delivered the abstracts of title to the property to his lawyer, Martin, and further, he directed them to go to the recordation to the offices of the Chicago Title and Trust Company and order a continuation of the abstracts. Mr. Hugh Martin is not here present on the occasion to obtain those titles as he stated the last signed by the first of the month. These instructions were carried out and Martin signed a continuation order with directions that the abstracts, when ready, be delivered to the plaintiffs. The continuation was completed in three days.

Later in the same day the defendant without Lesser

that Arnold had, by telegraph, revoked his power of attorney which he previously mailed to the defendant, but which had not arrived. The power of attorney was introduced in evidence. It bore the date February 15, 1927, and gave the defendant full power to convey and to contract for a conveyance of all of Arnold's interest in the premises in question. Tucker says that he asked the defendant how he accounted for Arnold's change of mind and that the defendant replied that he knew of no cause unless his son had told Arnold about Kosser's connection with the National Life Insurance Company. The defendant denies that any such conversation took place. The uncontradicted evidence, however, discloses that Arnold, before he sent the telegram of revocation, had a conversation over the telephone with the defendant's lawyer and his son, H. W. Stevens. What information they gave Arnold does not appear. It might well be inferred that something was said about the National Life Insurance Company because Arnold, in his letter to H. W. Stevens written nine days after the date of the telegram, stated that he had just been looking over a statement of that company and had observed that it had "made a gain of a little over Three Millions with less than Two Millions gain in Assets." This was followed by the inquiry, "What is the news, if any, in re Arcade?"

The defendant testified that he never agreed to sell the leasehold for $350,000.00 and that he did not tell Tucker, at any time, that he was favorable to a sale at that price. On cross-examination he made the rather fine distinction between saying that the proposed deal met with his favor and that it looked favorable. He admitted saying the latter. He further stated Tucker's proposition was that he would get a purchaser to sign a contract agreeing to pay $350,000.00 and deposit a $50,000.00

that would be, in fairness, granted the power of attorney which he previously mailed to the defendant, but which had not arrived. The power of attorney was introduced in evidence. It bore the date January 18, 1917, and gave the defendant full power to manage and to contract for a mortgage on all of Arnold's interest in the property in question. Under cover that he asked the defendant how he succeeded for Arnold's change of mind and that the defendant replied that he was at no cause unless his son had told Arnold about Arnaer's conversation with the National Life Insurance Company. The defendant denies that any such conversation took place. The uncontradicted evidence, however, discloses that Arnold, before he sent the telegram of revocation, had a conversation over the telephone with the defendant's lawyer and his son, E. G. Stevens. What information they gave Arnold does not appear. It might well be inferred that possibly one will issue the National Life Insurance Company because Arnold, in his letter to L. G. Stevens written nine days after the date of the telegram, stated that he had just been looking over a statement of that company and had observed that it has "made a gain of a little over three million dollars last year." This statement is inserted by the Arnold, "that is the news, if news is to be treated"

The defendant testified that he never signed or sent the leasehold for $5,000.00 and that he did not sell Arnaer, at any time, that he was favorable to a sale of that kind. He stated that he had the property divided by a line fence, the fence being that he proposed that was with his lower and that it lacked fourteen. He admitted saying the letter, in further stated Arnaer's conversation was that he would put a mortgage on this a contract already to say $5,000.00 and commute a $50,00.

check to bind the bargain and lay the contract and check upon the defendant's desk with the understanding that he, the defendant could "take it or leave it" as he pleased.

R. W. Stevens testified that on one occasion he heard Tucker make this proposition to the defendant. Hamer said that at one time Tucker told him that he had made a "take it or leave it" offer of $350,000.00. Martin testified that Tucker acknowledged, after being advised of Arnold's refusal to sell that he had proposed to the defendant to bring in a contract and check for the latter to accept or reject.

Both parties argue that their respective contentions are supported by the communications which passed between the owners of the property. On February 14, 1927, the defendant and his son telegraphed Arnold as follows:

> "Broker says ready to close on three fifty and deposit fifty earnest money. Hamer says will net you about seventy cash. We favor deal. Answer.
> J. W. and [illegible] [illegible]."

Arnold replied by telegram dated the next day;

> "Deal satisfactory to me. Am assuming Hamer's figure of about seventy cash is after deducting income tax as well as other taxes and commission.
> O. J. Arnold."

The defendant testified that when he and his son sent the telegram to Arnold he was then in favor of selling for $350,000.00, but that the owners were talking among themselves and not for Tucker's benefit. The son said he knew about the telegram and did not object to its being sent. Arnold took the witness stand and, on cross examination, admitted that when he sent his telegram in reply he, too, was willing to sell for $350,000.00.

The only direct evidence of record as to the reason for Arnold changing his mind is found in his letter of February 16,

check to bind the bargain and by the contract was struck when the defendant took with the understanding that, the defendant could "take it or leave it" as he pleased.

R. R. Cravens testified that on the occasion he heard Tucker make this proposition to the defendant. There was that at one time Tucker told him they had made a trade "take it or leave it" offer of $20,000.00. Cravens testified that Tucker acknowledged, after being advised of Lucille's refusal to sell that he had proposed to the defendant to clear in a contract and check for the latter to accept or reject.

Both parties argue that their respective contentions are supported by the communications which passed between the owners of the property. On February 14, 1917, the defendant and his son telegraphed Tucker as follows:

> "Broker says ready to close on three fifty and upward if they secure money. Tucker says will use you about seventy week. Is fifty deal. Answer.
>
> J. R. and S. R. Cravens."

Tucker replied by telegram dated the next day:

> "Deal satisfactory to me. Is mortgage owner's figure if money secured by either deduction income tax as well as other taxes and assessments.
>
> O. L. Tucker."

The defendants testified that when he had his son sent the telegram to Tucker he was then in favor of selling for $20,000.00, but that the owners were claiming some commission and not for Tucker's benefit. The son went to see about the telegram and did not object to its being sent. Cravens testified the witness stand out, on cross examination, admitted that when he sent his telegram in reply he, too, was willing to sell for $18,000.00.

The only direct evidence of record as to the reason for Tucker changing his mind is found in his letter of February 16,

1937, to the defendant, where, among other things, he said:

> "I need not repeat my views as to the value of this property, which, of course, have been strengthened materially by the recent rapid development in the western part of the loop. I am firmly convinced that we should not consider any price under what we agreed on before I left Chicago. I regret very much that I cannot be in accord with you in this matter, and as indicated above, regret also that I went to the extent of executing a power of attorney, which on reflection I had to revoke. However, I am still firmly convinced, that the value is there. I think we should by all means wait a little longer. I am confident we can get the price we agreed on. The fact that over a year has elapsed without a trade does not discourage me. "I am perfectly willing to let the power of attorney stand, but with the understanding that it will not be used except at $500,000 or better."

He says that he acted hastily but was principally influenced in so doing by his desire to do what he thought the defendant probably wanted him to do.

Before attempting to revoke the power of attorney he had talked over the telephone with A. A. Stevens and Martin. It would have been very natural for him to inquire as to the name of the proposed purchaser and for them to tell him it appeared that the National Life Insurance Company was the real purchaser. This would fully account for his change of mind.

There was ample evidence produced to warrant the jury in finding that the defendant contracted to sell the leasehold for a consideration of $350,000.00 and to pay a broker's commission of $20,000.00, conditioned upon his obtaining the consent of his son and Arnold to a sale upon these terms. It is not disputed that he obtained their consent. Likewise there was strong evidence to sustain a finding that this fact was communicated by the defendant to Tucker. If this were not the fact, why did the defendant turn the contract over to his attorney for examination and then direct that the continuation of the abstracts

1907, to the defendant, where, upon their return, he said:

> "I need not repeat my views as to the value of it is currently, which, of course, bear best information and materially by the recent rapid development in the western part of the town. I am firmly convinced that we should not consider any price under one hundred and on which I left things. I repeat very emphatically I cannot be in accord with you in this matter, and as indicated above, regret also that I feel in the extent of exercising a power of attorney, which on reflection I had to revoke. However, I am still firmly convinced that the value is there. I think we should by all means wait a little longer. I am sufficient as you put the price we turned on. The fact that over a year has elapsed without a trade does not discourage me. I am certainly willing to let the power of attorney stand, but with the understanding that it will not be used except at $[illegible],000 or better."

He says that he acted heedlessly but was primarily influenced in so doing by his desire to do what he thought the defendant reasonably wanted him to do.

Before attempting to revoke the power of attorney he had talked over the telephone with R. T. Dawson and Martin. It would have been very natural for him to inquire as to the name of the proposed purchaser and for them to tell him it appeared that the Michael Life Insurance Company was the real purchaser. This would fully account for his change of mind.

There was small evidence adduced to support the jury in finding that the defendant contracted to sell the Lonsdale for a consideration of $[illegible],000.00 and to pay a broker's commission of $[illegible],000.00, constituted upon his obtaining the consent of his son not should so a sale upon those terms. It is not disputed that he obtained their consent. Likewise there was strong evidence to sustain a finding that this fact was communicated by the defendant to Tucker. If this were not the fact, why did the defendant turn the portrait over to his attorney for cancellation and then direct that the continuation of the abstracts

be hastened and finally that the abstracts, when brought down to date, should be delivered to the plaintiffs?

One of the points in the brief of counsel for the defendant is that "a real estate broker cannot collect commissions from an owner on an uncompleted sale which fails because of an outstanding title known to the broker and not controlled by the owner." This point begs the question. There was no infirmity or defect in the title of the defendant to an undivided one-half interest in the property. He was competent to contract. If he wished to assume the responsibility of determining for himself that the three owners were willing to sell at the price offered there was nothing to prevent him from so doing. The question is: What was the bargain he made? If it was as testified to by Tucker then there is no reason why he should be relieved of the obligation of his contract because Arnold repudiated his agreement.

As to the contention that Tucker was guilty of such misconduct that the plaintiffs should be barred from recovery, it is virtually conceded that the defendant and his son knew that the National Life Insurance Company was the real purchaser before the defendant directed the abstracts to be continued and to be continued in time to close the deal before the first of the next month. Furthermore the defendant advised Tucker that the deal could not go through because Arnold had revoked his power of attorney. He said nothing about any infidelity on the part of Tucker. Neither does it appear that Arnold ever made any such claim. In addition to this he was not a party to the suit. The plaintiffs had no contractual relations, either express or implied, with him. They owed him no duty and they sought to establish no liability against him.

be mentioned was finally that the defendants, when asked, [illegible] to date, should be delivered to the plaintiff.

One of the points in the trial of consent for the defendant is that "a real estate broker [illegible] collect commissions from an owner on an unacceptable sale which fulfil requirements of an outstanding title among an broker and such [illegible] by the owner." This point says the [illegible]. There was no infringement or breach in the title of the defendant to an undivided one-half interest in the property. He was [illegible] to [illegible]. [illegible] claimed to assume the responsibility of determining the [illegible] that the owner were willing to sell at the price offered there was nothing to prevent his from so doing. The question is: did [illegible] the [illegible] in fact? If [illegible] satisfied to by [illegible] there is no reason why he should be relieved of the obligation of his contract [illegible] requirements [illegible].

In to the contention that there was [illegible] to [illegible] disagreement that the plaintiffs should be [illegible] from [illegible], it is strenuously contended that the defendant and the [illegible] that the [illegible] [illegible] [illegible] [illegible] before the defendant [illegible] [illegible] to be [illegible] and to be [illegible] in time to close the deal before the [illegible] the next morning. Furthermore the defendant [illegible] that the deal could not go through because [illegible] his power of attorney. He did nothing about any indemnity on the part of [illegible]. Neither does it appear that [illegible] ever made any such claim. In addition to this no [illegible] to the [illegible] the suit. The plaintiffs had no [illegible] relations, either express or implied, with him. They [illegible] and they sought to establish no liability against him.

It is finally urged that the judgment should be reversed because of erroneous rulings of the trial court in the giving and refusing of instructions. Plaintiffs' given instructions numbered 1 and 5 were peremptory in form. The objection to them raised by counsel for the defendant is that they ignored two substantial defenses to the action, i.e., that the plaintiffs were in fact representing the proposed purchasers and acting in their interests and that Arnold's concurrence was necessary to a sale. There was no evidence introduced by the defendant showing or tending to show that the plaintiffs were acting for the purchasers in the sense of establishing the relationship of principal and broker. They necessarily had to deal with the purchasers in the attempt to induce them to buy and in communicating to the defendant their acceptance of his offer. We are not inclined to give the title of evidence to Tucker's references to "the principals" or "my people" or "my principals", in speaking of the purchasers. In addition to this he was only a witness upon the trial of the case and his conclusions of law as to his relations with the purchasers would not be binding upon the plaintiffs. What has been previously said in this opinion disposes of the point that Arnold's concurrence in a sale was necessary and likewise of the contentions that the court erred in refusing to give defendant's instructions numbered 10 and 14.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

HOLDOM, P.J. and WILSON, J. CONCUR.

It is clearly proof that the judgment should be reversed because of excessive relief of the total sum to the giving and refusing of instructions. "Statutory" cases instructions numbered 1 and 2 were erroneously in form. The objection that raised by counsel for the defendant is that they lack legal two substantial defenses to the action, i.e., that the plaintiffs were in fact expropriating the proposed purchasers and acting in their interests but that should's economics was necessary to a sale. There was no evidence introduced by the defendant showing or tending to show that the plaintiffs were acting for the purchasers in the sense of maintaining the relationship of principal and broker. They consequently had to deal with the purchasers in the attempt to induce them to buy and in accordance to the defendant their acceptance of the action. Instructions not limited to give the trier of evidence to indicate relevance to "the principle" or "by people or "by principal", in speaking of the purchasers. In addition to this to use only a witness upon the trial of the case was the conclusion of law as to his relations with the purchasers would not be limited upon the plaintiffs. What has been previously said is this opinion discuss of the point that should's conclusion is a sale was necessary and likewise of the contention that the court erred in refusing to give defendant's instructions numbered 1) and 2).

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

McCUNE, P.J. and ELLETT, J. concur.

33008

CHICAGO FLEXIBLE SHAFT CO.,
a Corporation,

Complainant and Appellee,

v.

METAL POLISHERS, BUFFERS &
PLATERS UNION, LOCAL No. 6,
et al.

Appellants.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

252 I.A. 649

Opinion filed April 17, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

The only question involved in this appeal is whether the Superior Court of Cook County erred in finding that the respondents, John Werlik and Lewis Knaule, had violated the terms of a permanent injunction issued out of that court. Werlik and Knaule were members of the Metal Polishers Union. On May 2, 1927, the Union called a strike of the employees of the complainant, Chicago Flexible Shaft Company. The company was engaged in the business of manufacturing and distributing hardware specialties. Among its employees were about sixty metal polishers, buffers and platers. The strike was the result of a denial of an increase in wages.

On May 6, 1927, certain members of the Union, other than Werlik and Knaule, instituted a system of picketing of complainant's place of business. Signs were displayed stating that a strike was in progress and directing the public not to enter the place of business of complainant. Employees of complainant and persons seeking employment were intercepted and threatened with injury. Certain employees were beaten.

On June 28, 1927 complainant filed its bill of complaint in the Superior Court of Cook County against the Union

Opinion filed April 17, 1923

and some of its members, including Werlik and Knaule, praying for the writ of injunction. Two days later a temporary injunction was granted. On March 14, 1938, after a full hearing, the court entered a decree perpetually enjoining the defendants, including Werlik and Knaule.

> 1. From patrolling or congregating in front of, or in the vicinity of, the place of business of the complainant for the purpose of picketing;
>
> 2. From soliciting or inducing, or attempting to induce or influence persons by threats or intimidation not to enter into or continue in the employment of the complainant;
>
> 3. From assaulting, menacing, intimidating, threatening or harrassing persons employed by, or going to and from the place of business of the complainant;
>
> 4. From following the employes of the complainant to their homes or to other places, or from calling upon such employes at their homes for the purpose of inducing such employes to quit the employment of the complainant, by menacing molesting or intimidating such employes or their families;
>
> 5. From calling or addressing the employes of the complainant as 'scabs', and from calling or addressing other epithets or offensive language to the employes of the complainant;
>
> 6. From organizing, engaging in, maintaining or attempting to organize or maintain any boycott against the complainant by exhibiting or displaying any sign, placard or other matter, or by any other means, or for the purpose, or with the effect of causing the complainant's employes to quit its employment, and applicants for employment not to make application with the complainant for employment;
>
> 7. From injuring or attempting to injure the business of the complainant;
>
> 8. From advising, encouraging, or assisting in the doing of any of the things which are herein forbidden."

On June 2, 1938, the complainant filed its petition praying for a rule upon Werlik and Knaule to show cause why they should not be punished for contempt of court for violating the injunction. Being ordered so to do, the respondents answered

and some of its members, including Smith and Smalley, praying for the writ of injunction. Two days later a temporary injunction was granted. On March 14, 1938, after a long hearing, the court entered a decree permanently enjoining the defendants, including Smith and Smalley.

1. From intimidating or threatening to beat up, or in the vicinity of, the plant or employees of the complainant for the purpose of coercion;

2. From assaulting or threatening, or attempting to induce or induce persons by threats or intimidation not to enter into or continue in the employment of the complainant;

3. From assaulting, menacing, intimidating, threatening or harassing persons employed by, or going to and from the plant of business of the complainant;

4. From following the employees of the complainant to their homes or to other places, or from waiting upon such employees at their homes for the purpose of inducing such employees to quit the employment of the complainant, by causing suffering or intimidating such employees or their families;

5. From calling or addressing the employees of the complainant as 'scabs', and from calling or addressing other epithets or offensive language to the employees of the complainant;

6. From organizing, engaging in, maintaining or attempting to organize or maintain any boycott against the complainant by exhibiting or displaying any sign, placard or other matter, or by any other means, or for the purpose, or with the effect of causing the complainant's employees to quit the employment, and employees for employment not to make applications - for the employment for employment;

7. From injuring or attempting to injure the business of the complainant;

8. From evading, conspiring, or assisting in the taking of any of the things which are herein forbidden."

On June 8, 1938, the complainant filed its petition praying for a rule upon Smith and Smalley to show cause why they should not be punished for contempt of court for violating the injunction. Among others, on it 26, the respondents received

the petition. A hearing was had and they were found guilty of contempt. Werlik was ordered to pay a fine of seventy-five dollars and Knaule a fine of fifty dollars. Each was ordered committed to the County jail there to be confined until his fine was paid. They prayed for and were allowed this appeal.

No question is raised in the brief of the respondents about any ruling of the trial court on the admission or exclusion of evidence. The only point made by counsel for them is that they were engaged in peaceful picketing.

In the contempt proceedings the court found that both respondents had knowledge of the entry of the decree granting a perpetual injunction; "that from May 28, 1938, and up to and including June 9, 1938, more than one week after the entry of said rule to show cause (with the exception of Decoration Day, May 30, 1938, and Saturday, June 2, 1938), each of said respondents picketed and patrolled in front and alongside of the relator's place of business at Central Avenue and Roosevelt Road, Chicago, Cook County, Illinois, from shortly after 7:00 o'clock A. M. of each day until shortly after 5:00 o'clock P.M. of each day, with the exception of Saturday, June 9, 1938, which said picketing and patrolling ceased at about 12:00 o'clock noon; that each of said respondents carried and displayed a sign about eighteen inches by thirty-six inches in size bearing the inscription: 'METAL POLISHERS on STRIKE'; " that there was not on May 28, 1938, or thereafter any strike against the complainant in progress; "that prior to May 28, 1938, when said picketing and patrolling, and carrying and displaying of said signs were resumed, as aforesaid, from fifty to sixty persons applied each week for employment with the relator; that after the resumption of said picketing and patrolling, and carrying and displaying of said signs, less

the petition. A hearing was had and they were found guilty of contempt. Davis was ordered to pay a fine of seventy-five dollars and costs; a fine of fifty dollars. Jones was ordered committed to the County Jail until prior to sundown until his fine was paid. They appealed the cases, filed their bond.

No question is raised as to error in the proceedings about any ruling of the court, nor in the admission or exclusion of evidence. The only point made is against the claim as that they were engaged in peaceful picketing.

In the contempt proceedings the court found that such responsibility and knowledge of the entry of the order prohibiting - perpetual injunction; 'that from May 26, 1938, and up to and including June 8, 1938, more than one week after the entry of said rule to show cause (the date of the execution of contempt day, May 20, 1938, and thereafter, June 2, 1938), each of said defendants directed and participated in front and alongside of the relator's place of business at certain times and therefrom that, without, Cook County, Illinois, from shortly after 7:00 o'clock a. m. of each day until shortly after 10:00 o'clock p.m. of each day, with the exception of Saturday, June 4, 1938, which said picketing and patrolling, began at about 12:00 o'clock noon; that each of said respondents carried and displayed a sign about eighteen inches by twenty-six inches in size bearing the inscription 'ERIE COLLOIDS ON STRIKE'; " that there was put on May 26, 1938, or thereafter any strike against the complainant in progress; "that prior to May 26, 1938, when said picketing and patrolling, and carrying and displaying of said signs were resumed, on plaintiff, from 7:00 to sixty persons applied such sign for employment with the relator; that after the resumption of said picketing and patrolling, and carrying and displaying of said signs, less

than half that number of persons applied for employment with the realtor per week; that prior to May 28, 1928, from ten to twelve polishers and buffers applied each week for employment with the relator during the two weeks that said picketing and patrolling and carrying and displaying of said signs continued, but eight polishers and buffers applied for employment with the relator, six during the first week and two during the second week, and of the six polishers and buffers so applying for employment with the relator during said first week, several refused to enter the employment of the relator unless they were furnished with guards for their protection"; "that during the strike against the relator and during the course of the picketing of its place of business in May and June, 1927, certain acts of violence had been committed by certain of the defendants in said cause, as set forth in the bill of complaint filed herein, and by reason of such violence the defendant in said cause, including both of said respondents, had forfeited their right to engage in peaceful picketing; and that the respondents wilfully and deliberately violated the injunction."

Counsel contend that the statute of this state entitled, "An Act relating to disputes concerning terms and conditions of employment," in force July 1, 1925, has rendered picketing, unaccompanied by threats or intimidation, lawful. It is said that the injunctional decree should be read in the light of the statute. We are not impressed with the argument. The court had jurisdiction of the subject matter and the persons and there was no appeal from the decree. In addition to this, the banner in question may have appeared to be of an innocent and peaceable character to the disinterested passerby, but not so to the employed or those seeking employment. To the latter it spoke more effectively than word of mouth. They were told that a strike was on, involving the complainant. There had been a

strike in which violence was used. From the time of the issuance of the temporary restraining order until the entry of the final decree all activities were suspended. The renewal of picketing, together with the display of the word "Strike" in front of the complainant's premises was well calculated to inspire in those seeking employment the belief that hostilities had been renewed and that they might well expect that the methods at first adopted would be put in force.

Counsel in his brief says:

> "The defendants testified that their purpose in carrying the sign was to notify other members of the Metal Polishers Union who might wish to apply for work at the Chicago Flexible Shaft Company that metal polishers were on a strike, leaving it to their discretion as to whether or not after knowing the facts they wished to make application for employment. Had the sign indicated that complainant was unfair or had it directed employes to stay away from complainant's place of business it might be argued that the sign was threatening and intimidating."

Regardless of the testimony of the respondents, the obvious purpose of the banner was to notify everybody coming to the place of business of the complainant that a strike was on. There was nothing to indicate to prospective employees that it was not a strike of the character originally instituted with its attendant threats and acts of violence.

The order of the Superior Court of Cook County finding the respondents guilty of contempt of court and imposing fines upon them is affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

strike in which violence has been. Then the king of the
immunes of the temporary restraining order until the entry of
the final decree all activities were suspended. The counsel
of picketing, together with the enquiry of the case "arising"
front of the constitutionality, validity and propriety of the
police in those existing circumstances the judge that injunction
had been renewed and that the right will exist that the
matters in first decree could be set in force.

Counsel in his brief says:

> "The defendants contend that their action in carrying the sign and in notify other members of the metal trades union the right that to apply for work at the Crown Plaster Mill cannot be said unlawful. To make it so, having in mind discussion in the Ontario case, leaving it to their discretion as to whether or not after reading the letter they wished to make application for employment, but the sign indicated that conditions and labor as how is dissatisfied employee to stay away from work-limit's place of business it might be regard (?) the sign was interfering and intimidating."

"Operation" of the Statutory or the respondents, the
Ontario notice of the counsel was to notify everybody coming
to the place of business of the complainant that a strike was
on. There was nothing to indicate to prospective employees
that it was not a strike of the character originally instituted
with its attendant threats and acts of violence.

The order of the Ontario court of appeal clearly finding,
the respondents guilty of contempt of court and imposing fines
upon them is affirmed.

Affirmed.

Solicitors, F.G. Jet Fisher, K. Ontario.

33033

THE BELL OIL & GAS CO., a Corporation,

Appellee,

v.

INDIANA HARBOR BELT RAILROAD COMPANY, a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 IA. 649

Opinion filed April 17, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

This appeal is from a judgment of the Municipal Court of Chicago, in favor of the plaintiff, for the sum of $11,009.48. The judgment was entered upon the verdict of a jury.

On August 1, 1933 the plaintiff filed its Statement of Claim in which it was stated that the plaintiff, on June 8, 1932, shipped from Homer, Louisiana to East Chicago, Indiana, five cars of gasoline, consigned to its own order; that upon arrival of the cars at their designated destination they were, without order of the plaintiff, turned over by the defendant to the Martin Oil Refining Company and that the defendant failed and refused to return to plaintiff the cars or to pay for the gasoline.

On August 13, 1933, the defendant filed its affidavit of merits in which it denied that the plaintiff was the lawful holder of the bills of lading covering the shipment in question and alleged that the Martin Oil Refining Company was the owner.

On December 13, 1934, more than a year after filing its affidavit of merits, the defendant filed an amended affidavit of merits, in which it denied that the plaintiff was, at any time,

Opinion filed April 17, 1929

the lawful holder of the bills of lading for the transportation of the shipment. It also contained the allegation that the cars of gasoline were consigned to the Martin Oil Refining Company under certain written contracts between that company and plaintiff, dated June 13, 1922. Then follows paragraph 3 of the affidavit which reads:

> "Defendant further alleges that the cars mentioned in plaintiff's statement of claim were delivered to the Martin Oil Refining Company, the duly authorized agent of the Bell Oil & Gas Company; that subsecuent to the delivery of said cars as aforesaid, the plaintiff ratified and confirmed the delivery to the Martin Oil Refining Company and undertook to make settlement with the Martin Oil Refining Company pursuant to the terms of the contracts of June 13, 1922, as above referred to."

The affidavit concludes with a denial that the gasoline was of a value of $8,609.44, that the cars contained 40,515 gallons of gasoline or that the plaintiff had ever made demand for a return of the shipment.

The contracts of June 13, 1922, referred to in the amended affidavit of merits, consist of two documents. Both bear the same date. One is an acknowledgment by the Martin Oil Refining Company of an order from plaintiff to ship to the latter eighteen cars of blended gasoline at the price of ".2022" per gallon. It further provided that:

> "It is understood and agreed by both parties to this sale that Martin Oil Ref. Co. are blending this product for Bell Oil & Gas Co. from 11 cars of 45/47 gravity Naphtha covered by our P. O. 145 and 7 cars casinghead covered by our P. O. 146 which cars they now have on track in Ohgo & which will be diverted into our plant & the price shown on our P. O. Acknowledgment represents cost to them & the blended product is to be turned back to them at our refinery at this price plus .0264 per gal. frt. plus .01½¢ per gal. blending charge; Martin Oil Ref. Co.'s responsibility to cease when cars are loaded & billed out, the purchaser adjusting direct any claims of any nature which may arise after cars have left our plant.
>
> Accepted
>
> Bell Oil & Gas Co.
>
> Mark Finston."

the lawful holder of the bills of lading for the transportation of the shipment. It also contains the allegation that the price of gasoline were conveyed to the Smith Oil Refining Company under certain written contracts between that company and Smith, dated June 14, 1922. Then follows paragraph 5 of the affidavit which reads:

> "Plaintiff further alleges that the said contract in plaintiff's possession of Smith and delivered to the Smith Oil Refining Company, the duty devolved upon at the said Oil & Gas Company; that subsequent to the delivery of said gas as aforesaid, the defendant refused and neglected the delivery to the Smith Oil Refining Company and declined to make settlement with the Smith Oil Refining Company pursuant to the terms of the contracts of June 14, 1922, as above referred to."

The affidavit concludes with a prayer that the gasoline was of a value of $4,[illegible], that the sum contained $[illegible] gallons of gasoline or that the plaintiff has ever made demand for a return of the shipment.

The contract of June 14, 1922, referred to in the complaint affidavit of merits, consist of two documents, with each the same date. One is an acknowledgment by the Smith Oil Refining Company of an order from plaintiff to ship in the latter eighteen cars of stamped gasoline at the price of "[illegible] per gallon." It further provides that:

> "It is understood and agreed by both parties to this sale that Smith Oil and Gas Co. are selling this product for Oil & Gas Co. Now if cars of 42\47 gravity further covered by our c. o. D. bill and 7 cars casinghead covered by our B. L. L. Co. which they have on hand is first to ship & which will be invoiced and our check & the order shown on our B. L. Casinghead is to be returned back to them at our refinery at this office plus .0044 per gal. for, plus .0[illegible] per gal. Gasoline covered with our B. L. Co.'s responsibility to cars now are loaded & billed out, the purchaser otherwise direct any claims of any nature which may arise after cars have left our plant."

Respectfully,

Smith Oil & Gas Co.

By [illegible]

The other document is a notice of the consignment by the plaintiff to the defendant of eleven cars of naphtha and seven cars of gasoline. Included in the consignment were the five cars of gasoline in controversy. Incorporated in the notification was the following:

> "It has been mutually agreed and understood, that you are to pay us .13½¢ per gallon for the Naphtha and .31¢ per gallon for the raw Casinghead, less 1% Cash to be paid upon receipt of ladings in your possession.
> We in turn agree to buy from your concern (18) cars of 56-58 B. W. Gasoline having an end point not to exceed 475, providing our naptha makes same at a price of 30.14 per gal. F. O. B. East Chicago, Indiana. Terms 1% Cash upon delivery of ladings.
> It is also understood and agreed that the Naptha and Casinghead mentioned above, prices of which were .13½ and .31¢ respectively, were also F. O. B. group (3) rate of freight. We guarantee to stand all demurrage, reconsigning and any expenses that have acorued on the Naptha and Gasoline which we are sending in to you.
> We further agree to stand all outage on the above shipments.
> Your signature below will denote full acceptance of the above conditions and understandings.
>
> Yours truly,
> Bell Oil & Gas Company
> Mark Finston."

These documents clearly evidence purchase and sale transactions. They do not make the Martin Oil Refining Company either the agent or bailee of the plaintiff. They call for cash payment for the naptha and gasoline by the Martin Oil Refining Company upon receipt of the bills of lading. Likewise the plaintiff obligated itself to pay cash for the blended product. In fact the defendant, upon the trial of the case, recognized that such is the correct construction of the documents. It offered to prove that Finston, vice-president of plaintiff company, told Martin of the Martin Oil Refining Company, that he wanted the latter to blend the naptha and gasoline and would be willing to pay one and one-half cents per gallon for the service; that Martin accepted the proposition; that Finston then said, "I wish this transaction to appear as a sale"; and that the two documents

The other document is a notice of the commitment by the plaintiff to the defendant of seven cars of motion and seven cars of gasoline. Included in the commitment were the five cars of gasoline in controversy. Incorporated in the notification was the following:

> "It has been mutually agreed and understood, that you are to pay us .15¼¢ per gallon for the supplies and .01¼ per gallon for the new [illegible], less 1% cash to be paid upon receipt of invoice on your accounting.
>
> We in turn agree to buy from your company (7) cars of 36-38 m. m. Gasoline having an end point not to exceed 410°, providing our motion meets some of a point of 8.15 per gal. f. o. b. East Chicago, Indiana. These 1% cash upon delivery of invoice.
>
> It is also understood and agreed that the terms and conditions mentioned above, prior to which are .15¼ and .01¼ respectively, were also f. o. b. Texas (7) cars of Motor, to guarantee to stand all damages, reconsigning and any expenses that have accrued on the motion and gasoline which we are sending in to you.
>
> We further agree to stand all outlay on the part obligation.
>
> Your signature below will denote full consent and of the above conditions and understanding.
>
> Yours truly,
>
> Gulf Oil & Gas Company
>
> Mark Kimston."

These documents clearly evidence purchase and sale transactions. They do not make the Martin Oil Refining Company either the agent or bailee of the plaintiff. They call for such payment for the motion and gasoline by the Martin Oil Refining Company upon receipt of the bills of lading. Alleged the plaintiff obligated itself to pay cash for the gasoline product. In fact the defendant, upon the trial of the case, recognized that such is the correct construction of the documents. It offered to prove that Kimston, vice-president of plaintiff company, told Martin of the Martin Oil Refining Company, that he wanted the latter to blend the motion and gasoline and sold it filling to pay one and one-half cents per gallon for the services; that Martin accepted the proposition; that Kimston then said, "I also this transaction to appear as a sale"; and that the two documents

were then prepared in such form as to cause it to appear that the transaction was a sale.

An objection to this offer of proof was sustained, and properly so. In the original affidavit of merits, the agent of the defendant, to whom was entrusted the responsibility of making the affidavit and who was presumably familiar with all of the facts pertinent to a defense, made the positive statement that the Martin Oil Refining Company was the owner of the shipment. Over a year later in an amended affidavit of merits the same agent stated that the shipment was consigned to the Martin Oil Refining Company by virtue of the provisions of certain contracts in writing, dated June 13, 1928, and that the gasoline was delivered to this company as the duly authorized agent of the plaintiff. To further accentuate the shifting of defenses the defendant, without any supporting pleading or affidavit of merits, had the temerity to ask the court to receive evidence in support of a new contention that the transaction was one of bailment for the sole purpose of enabling the Martin Oil Refining Company to blend the naphtha and gasoline and deliver the blended product to the plaintiff. It would have been a travesty upon justice for the trial court to have favorably entertained this offer of proof.

It is undisputed that the defendant delivered the cars of gasoline to the Martin Oil Refining Company without requiring the production and surrender of the original bills of lading. To protect itself against the consequences of its unlawful act it procured from the Martin Oil Refining Company an indemnifying bond. It had no order from the plaintiff and no right to make the delivery. Its defense that no harm was done by the wrong because delivery of the shipment was made to the party entitled to possession is not supported by the evidence.

were then prepared in such form as to cause it to appear that the transaction was a sale.

An objection to this offer of proof was sustained, and properly so. In the original affidavit of sale, the agent of the defendant, to whom was entrusted the responsibility of making the affidavit and who was presumably familiar with all of the facts pertinent to a defense, made the positive statement that the Martin Oil Refining Company sold the goods of the plaintiff. Even a year later he is on amended affidavit of sale the same agent stated that the affidavit was contained to the Martin Oil Refining Company by virtue of the relations of agents contracts in writing, dated June 17, 1920, and that the goods was delivered to this company in the fully authorized agent of the plaintiff. In further support of the affidavit of defense the defendant, without any supporting pleading or affidavit of merits, had the temerity to ask the court to receive evidence in support of a new construction that the transaction was one of bailment for the sole purpose of enabling the Martin Oil Refining Company to blend the supplies and compounds and deliver the blended product to the plaintiff. It would have been a travesty upon justice for the trial court to have improperly rejected this offer of proof.

It is undisputed that the defendant delivered the cars of gasoline to the Martin Oil Refining Company without requiring the production and surrender of the original bills of lading. To protect itself against the consequences of its unlawful act it procured from the Martin Oil Refining Company an indemnifying bond. It had no order from the plaintiff and no right to make the delivery. The defense that no bond was demanded by the strong company delivery of the shipment was made to the party entitled to possession is not supported by the evidence.

Much is said about serious prejudice to the rights of the defendant because counsel for the plaintiff in his opening statement and his argument to the jury stated that the defendant had required, as a condition precedent to the delivery of the cars of gasoline, a bond to protect it and that the court allowed proof of the fact. That the bond was given was proved and no logical reason is advanced to support the contention that this fact should have been concealed. It was a part of the transaction in connection with the delivery of the goods. It was the sole reason given by an agent of the defendant to the vice-president of plaintiff for the delivery of the gasoline without requiring delivery of the bills of lading. Furthermore, the evidence was competent for the purpose of showing the character of the divergent and inconsistent defenses sought to be interposed. It is evident that the wrongful delivery was made not in reliance upon the Martin Oil Refining Company being the owner of the gasoline, or that this company was the agent or bailee of the plaintiff, but solely upon the formal assurance of indemnity against loss.

The only other substantive defense interposed was that the plaintiff failed to establish that it was the lawful holder of the bills of lading covering the shipment in question. The court admitted in evidence five documents as Plaintiff's Exhibits 1, 2, 3, 4 and 5. They purport to be original bills of lading. The data contained in them corresponds with the dates, car numbers, quantities and other facts proved in connection with the transaction in question.

The testimony of [illegible]. S. Sumner was taken by deposition. He testified that in June, 1922, he was superintendent of the Gilliland Oil Company. It was established by other testimony that this company sold the gasoline in controversy to the plaintiff.

Much is said about various obligations on the rights of the defendant process counsel for the plaintiff in his opening statement and his argument to the jury which had not introduced, and a particular reference to the authority of the case of Wheeling, a term in Detroit is not that the court ignore proof of the fact. That the mind the jury are drawn and no logical reason is advanced to support the assertion that this fact should have been conveyed. It was a part of the transaction in connection with the delivery of the goods. It was the reason given by on behalf of the defendant of the non-existence of plaintiff for the delivery of the goodies without authority delivery of the bills of lading. Nevertheless, the evidence competent for the purpose of showing the existence of the diversent and inconsistent interest should be by inference. It is evident that the original delivery and bills not is dispute upon the North Oil Company using the bonds of the Wheeling, or that this company and the agent in bonds of plaintiff, but solely upon the legal existence of Commonly legalist loss.

The only other substantive defense interposed was that the plaintiff failed to establish that it was the lawful holder of the bills of lading covering the shipment in question. The court admitted in evidence five documents as plaintiff's Exhibits 1, 2, 3, 4 and 5. They purport to be original bills of lading. The data contained in them corresponds with the terms, car numbers, quantities and other facts proved in connection with the transaction in question.

The testimony of J. C. Hamer was taken by deposition. He testified that in June, 1920, he was secretary-treasurer of the Milliken Oil Company. It was established by other testimony that this company had the goodies in controversy to the plaintiff.

He was shown plaintiff's Exhibits 1, 2, 3, 4 and 5, and testified that they bore his signature at the bottom and that he received them from an agent of the Louisiana & Northwest Railroad Company. Finally he was asked:

> "Do you now say, after examining these bills of lading, Plaintiff's Exhibits 1 to 5, that they and each of them are the original bills of lading for the material mentioned therein, and that the statements in the said bills of lading and each of them are correct?"

The witness answered: "I do."

A general objection to the question was made upon the trial, but there was no ruling and it does not appear that any objection was made upon the taking of the deposition. When the bills were offered in evidence counsel for the defendant objected to their introduction until he had read the cross-examination of the witness. At the close of the re-direct examination counsel who represented the defendant in the taking of the deposition, made the objections that the statement of claim alleged that the plaintiff made the shipment, whereas the bills of lading offered showed that the Gilliland Oil Company was the shipper, that it did not appear that the plaintiff had any interest except as consignee and that he did not think the bills had been identified as the ones covering the cars in question. When the reading of the deposition had been concluded the trial attorney for the defendant made substantially the same objections.

Finston, vice-president of the plaintiff, testified that he purchased the gasoline from the Gilliland Oil Company and gave instructions to that company to ship the gasoline to plaintiff at East Chicago, Indiana; that he received plaintiff's exhibitsl to 5 inclusive from the Gilliland Oil Company about June 10 or 11, 1922, and later placed them with the First National Bank of Chicago with a sight draft drawn on the Martin

He was shown plaintiff's exhibits 1, 2, 3, 4 and 5, and stated that that they were his signature to the letters on file in received them from an agent of the defendant's informant railroad company. Finally he was asked:

> "Do you not say, after examining those letters of letting, Plaintiff's exhibits 1 to 5, that they and each of them are the writing which is signed to the machine manufacturer's letters, and that the signature in the will build of letting and such of them are correct?"

The witness answered: "I am."

A general objection to the question was made upon the trial, but there was no ruling and it does not appear that the objection was made upon the ruling of the deposition. When the bills were offered in evidence counsel for the defendant objected to their introduction until he had read the interrogatories of the witness. At the close of the cross-examination counsel was recognized the defendant in the taking of the deposition, made the objections that the statement of claim alleged that the plaintiff made the shipment, whereas the bills of lading offered showed that the oil ilsed 21 "Company was the shipper, that it did not appear that the plaintiff had any interest except as consignee and that he did not sign the bills had been identified as the same covering the same in question. Upon the reading of the deposition had been concluded the trial attorney for the defendant made substantially the same objections.

Instead, the plaintiff's of the plaintiff, testified that he succeeded the goodies from the Gilliland Oil Company and gave instructions to that company to ship the goodies to plaintiff at East Chicago, Indiana; that he received Exhibits 6 inclusive from the Gilliland Oil Company about June 10 or 11, 1921, and later placed them with the First National Bank of Chicago with a sight draft drawn on the Smith

Oil Refining Company. The draft was deposited with the bank for collection but it was never honored by the drawee.

The contents of the bills of lading, admitted in evidence correspond in every detail with the facts proved concerning the transaction involved in this appeal. Sumner, superintendent of the Gilliland Oil Company, received the instruments from the initial carrier in connection with the shipment of the gasoline described in them. The plaintiff bought the gasoline from the Gilliland Oil Company and gave shipping instructions. The bills of lading were delivered by that company to the plaintiff's representative. He deposited them with a Chicago bank to be delivered to the Martin Oil Refining Company upon its payment of a sight draft for the contract price. Payment was not made. The court did not err in admitting in evidence plaintiff's exhibits 1 to 5, inclusive.

It is finally urged that there was a material variance because the bills of lading show that the shipper was the Gilliland Oil Company and the plaintiff in its statement of claim says that it (the plaintiff) shipped the goods. This is mere idle talk. It appears from the evidence, and without contradiction, that the plaintiff bought the gasoline and furnished the shipping instructions. The plaintiff was, in fact, the shipper.

From the foregoing we conclude that the defendant should be relegated to its rights under the indemnifying bond which it took, evidently in anticipation of the happening of that which did happen, i. e., a successful prosecution of a suit by the owner of the gasoline for damages due to the wrongful act of the defendant in not protecting the owner's rights by requiring the surrender of the bills of lading before making delivery of the goods.

For the foregoing reasons, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

Oil refining Company. The draft was deposited with the bank for collection but it was never honored by the drawee.

The contents of the bills of lading, however, is evidence corresponding in every detail with the facts proved concerning the transaction involved in this action. Thomas, assistant of the Gulliland Oil Company, received the instructions from the initial carrier in Tennessee with the shipment of the gasoline described in them. The plaintiff bought the gasoline from the Gulliland Oil Company and gave elaborate instructions. The bills of lading were delivered by this company to the plaintiff's representative. He furnished them with a check, said to be delivered to the Gulliland Oil Company upon the payment of a sight draft for the contract price. Payment was not made. The court did not err in admitting in evidence plaintiff's exhibits 1 to 8, inclusive.

It is finally urged that there was a material variance between the bills of lading show that the shipper was the Gulliland Oil Company and the plaintiff in its statement of claim says that it (the plaintiff) shipped the goods. This it was idle to talk. It appears from the evidence, and without contradiction, that the plaintiff bought the gasoline and forwarded the shipping instructions. The plaintiff was, in fact, the shipper.

From the foregoing - conclude that the defendant should be relegated to its rights under the indemnity bond which it took, evidently in anticipation of the happening of that which did happen, i. e., a successful prosecution of a suit of the owner of the gasoline for damages due to the wrongful act of the defendant in not protecting the owner's rights by requiring the surrender of the bills of lading before making delivery of the goods.

For the foregoing reasons, the judgment of the Supreme Court of Oklahoma is affirmed.

Affirmed.

Mr. Justice Holmes, dissents.

No. 33039

SILVER CREEK COAL COMPANY,
a Corporation,

Appellant,

vs.

AETNA MORTGAGE AND SECURITY
COMPANY, a Corporation, doing
Business as Geneva Apartments,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

252 I.A. 649

Opinion filed April 17, 1929

MR. JUSTICE RYNER delivered the opinion of the Court.

The plaintiff, from May 4 to July 22, 1927, sold and delivered to Antoni Nieminski and his wife, the lessees of an apartment building on Kenmore Avenue in the City of Chicago, coal of the value of $1,021.32. Some small payments were made on account, leaving a balance due of $646.32.

On December 5, 1927, the Nieminskis were dispossessed by their lessor, the defendant, Aetna Mortgage and Security Company. The company had obtained a judgment for possession and had also foreclosed a chattel mortgage on the personal property in the premises.

The defendant remained in possession from December 5, 1927 to January 18, 1928. Evidence was introduced tending to show that during that period of time it used about fifty-five tons of the coal for the purpose of heating the building.

The trial court correctly held that there was no liability imposed upon the defendant to pay for the coal

Opinion filed April 17, 1929

Mr. Justice Vitz delivered the opinion of the court.

The plaintiff, from May 4 to July 31, 1927, sold and delivered to defendant plumbing for his city, the larger of an apartment building in Kenmore Terrace in the city of Chicago, coal of the value of $1,027.50. Some small payments were made on account, leaving a balance due of $962.50.

On December 3, 1927, the plaintiff was disappointed by which lower, the defendant, after bankruptcy and insolvency proceeding. The company had obtained a judgment for possession and had also instituted a criminal action against the personal property in the premises.

The defendant received it, [illegible] December 3, 1927 to January 18, 1928. Witnesses are introduced tending to show that during that period of time it had some fifty-six tons of the coal for the purpose of heating the building.

The trial court correctly held that there was no liability imposed upon the defendant to pay for the coal

consumed, made a finding in its favor, and entered judgment upon the finding.

The coal had been delivered and title had passed to the Nieminskis before the defendant took possession. The plaintiff had parted with title and all right of lien. The defendant is not obligated to account to anybody but the Nieminskis for the value of the coal used. The cases cited, involving insolvent or bankrupt purchasers of personal property, are not applicable to the facts in the instant case. They apply where goods purchased are in transit or process of delivery but not after delivery has been made and accepted.

The judgment of the Municipal Court of Chicago is accordingly affirmed.

AFFIRMED.

HOLDOM, P. J. AND WILSON, J. CONCUR.

33074

FREDRICK F. WATSON,
Complainant,
v.
AD-PHOTOSCOPE COMPANY, a Corporation,
LEE M. KIRCHEN, et al.,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

259 I. A. 649

Opinion filed April 17, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

This appeal is the result of a "friendly receivership." At the inception of the litigation the attorneys representing the parties here were friendly. Now they are indulging in the exchange of epithets and charges of unethical conduct.

On March 8, 1923, Fredrick F. Watson filed his bill of complaint in the Superior Court of Cook County, in which he alleged, in substance, that he had been employed by the Ad-Photoscope Company in the capacity of assistant business manager upon a commission and salary basis and that the company was indebted to him "for wages for the sum of $[illegible],100.00"; that he owned three shares of stock in the company; that Lee M. Kirchen, an employee of the company had obtained a judgment for $6,027.00 against it and had execution levied upon its property; that G. J. Peterson had levied a landlord's distress warrant for $1,066.00 on the Company's property; that the company, through its president, had made a contract with Brinner & Burnett to consolidate with another company and, pursuant to the agreement, Brinner & Burnett were permitted to obtain control of the directorate of the company and thereby to sell to the company certain assets for an exhorbitant

Opinion filed April 17, 1989

Mr. JUSTICE [illegible] delivered the opinion of the court.

This appeal is the result of a "friendly controversy." At the inception of the litigation the attorneys representing the parties here were friendly. Now they are involved in the exchange of epithets and charges of unethical conduct.

On March 8, 1984, Patrick F. Nelson filed his bill of complaint in the Superior Court of Cook County, in which he alleged, in substance, that he had been employed by the Chicago Housing Authority in the capacity of assistant business manager upon a probation and salary basis and that the company was indebted to him "for wages for the use of $1,[illegible]; that he owns three shares of stock in the company; that Mr. [illegible], as agent of the company had obtained a judgment for $[illegible] against it and had execution issued upon its property; that C. A. Peterson had levied a [illegible] against for $1,[illegible] on the company's property; that the company, through its president, had made a contract with Plaintiff's Attorney to compromise the matter upon payment of [illegible] in the aforesaid; Plaintiff's Attorney was instrumental in obtaining control of the interests of the company for himself in the Internal certain assets for an exchange

consideration; that the landlord's distress warrant was the result of an agreement between himself and Brinner & Burnett to enable the latter to obtain the assets of the Company; that no notice was given to the stockholders of the change of directors and that some court of competent jurisdiction should protect the company until a meeting of its stockholders could be held.

The relief prayed for was that an accounting be had with Brinner & Burnett and others; that a receiver be appointed; that Kirchen be restrained from further proceeding under her execution; that the directors selected by Brinner & Burnett be restrained from acting; and that the receiver be instructed to call a meeting of the stockholders for the purpose of electing a new Board of Directors, or to sell the assets and wind up the affairs of the company.

There was no charge in the bill of complaint that the Ad-Photoscope Company was insolvent and it is apparent that the primary object of the proceeding was to free the company from the control of Brinner & Burnett and permit it to continue doing business under the management of a directorate selected by the stockholders.

The court appointed a receiver, ordered the calling of a meeting of the stockholders for the purpose of considering the question of levying an assessment on the stock sufficient to pay the existing obligations of the company and enjoined the directors appointed by Brinner & Burnett from acting and Kirchen and Peterson from proceeding further in the enforcement of their respective claims.

consideration, that the Institute's letters patent - under the terms of an agreement between Bloedt and Company & Company - would the latter to obtain the benefit of its knowledge, but no notice was given to the existence of the Bureau of Standards and that upon court of government laboratory should protect the company until a meeting of its stockholders could be held.

The relief prayed for was that an accounting be had with respect to a contract and whether the defendants be enjoined, that Bloedt be restrained from further transferring under her exclusive, that the Bureau enjoined by defendant, I Bennett be restrained from selling, and that the appellant be instructed to call a meeting of the stockholders for the purpose of electing a new board of directors, or to call the assets and rights rights of the company.

There was no charge in the bill of complaint that the Lo-Ilumenous Company was insolvent and it is important that the primary object of the proceeding was to free the company from the control of Bennett & Bennett and permit it to continue doing business under the management of a directorate selected by the stockholders.

The court sustained a demurrer, sustained the calling of a meeting of the stockholders for the purpose of considering the question of laying an assessment on the stock sufficient to pay the existing obligations of the company and enjoined Bennett appointed by Bennett & Bennett from selling and Bloedt and Bennett from proceeding further in the enforcement of their respective claims.

The Ad-Photoscope Company answered the bill of complaint. The answer was filed by Kirchen, representing herself to be a duly authorized officer and agent of the Company. It admitted certain of the allegations of the bill and called for strict proof of others. Among the allegations which the answer required the complainant to support with strict proof was that charging that Kirchen had obtained a judgment against the company for $6,027.00 and was seeking to enforce it.

On September 24, 1923, the receiver filed a petition wherein he recited that an order had been entered authorizing him to sell all of the corporate assets to a committee and trustees representing the stockholders of the Ad-Photoscope Company for the sum of $26,000.00; that the committee had paid $10,000.00 on account of the purchase price but refused to pay the balance until the Watson, Kirchen and Peterson claims were disposed of and the assets freed from the receivership; that Watson's claim was for $2,100.00 for wages and could be compromised by the payment of $1,100.00 in cash and $1,000.00 worth of stock in a corporation to be organized by the purchasing committee; that the Peterson claim for $18,166.57 could be settled for $4,000.00 and that the Kirchen claim for $6,000.00 could be compromised and settled by the payment of $5,000.00. Three days later the petition was amended so that it showed that the Watson claim was to be paid all in cash.

The matter was referred to a master in chancery. He recommended the compromise of the claims as requested by the receiver, the Watson claim to be settled by the payment of $1,100.00 in cash and the balance in "stock in a new corporation now being organized." His report was confirmed and on October 3, 1923, the court directed the receiver to pay the amounts to the

The id-Interiors Company assumed the cost of construction. The owners are Jimmy Jackson, Instructors Journal to be a 50% substituted officer and agent of the Company. It appeared certain of the allegations of the bill and called for strict proof of claims. Among the allegations which the answer required the complainant to prove (1) stated that we had a contract that Jackson had obtained a judgment against the company for $6,027.37 and was seeking to enforce it.

On September 24, 1922, the receiver filed a petition wherein he recited such an order had been entered authorizing him to sell all of the corporate assets to a committee of trustees representing the shareholders of the id-Interiors Company for the sum of $18,000.00; that the committee had paid $14,000.00 on account of the purchase price and agreed to pay the balance until the Court, Jackson and Interior Guides were disposed of and the excess fund from the partnership; that Jackson's claim was for $3,150.00 for wages and could be discharged by the payment of $1,500.00 in cash and $1,000.00 notes of which is a contingency to be obtained by the committee; that the contract claim for $3,150.00 could be satisfied for $1,000.00 and that the Interior claim for $2,877.37 could be compromised and settled by the payment of $1,000.00. Three days later the petition was amended so that it alleged that the Jackson claim was to be paid all in cash.

The matter was referred to a master in chancery. He recommended the compromise of the claims as recommended by the receiver; the Jackson claim to be settled by the payment of $1,500.00 in cash and the balance in future in a new contract, and the Interior claim for $1,000.00. His report was confirmed and in October 1923, the Court directed the receiver to pay the amount in the

respective claimants as recommended by the Master except that the Watson claim should be paid all in cash.

On October 16, 1923, the court referred all claims of creditors which had not been allowed to a Master in Chancery to make proofs.

On March 7, 1927, Charles H. Mitchell was given leave to file an intervening petition in which it was recited that the pleading was filed in his own behalf and for "certain unsecured creditors." Who the creditors were does not appear. The petition charged that Vincent H. Gallagher acted as solicitor for the complainant Watson and also for the defendant Kirchen, and that he conspired with the receiver and his attorneys to have the claim of Watson allowed as a preferred wage claim, whereas in fact the claim was for salary as assistant general manager of the Ad-Photoscope Company and not entitled to a preference; and that the Kirchen judgment was the result of collusion and that the receiver was remiss in his duties in failing to contest the claim. The prayer of the petition was that the receiver because of his misconduct be ordered to account for the $2,100.00 paid to Watson, and to refund the sum of $2,250.00 paid to him as fees; that his solicitors be required to refund the sum of $1,000.00 paid to them as fees and that no compensation whatsoever be allowed to the receiver for his services or those of his solicitors.

The petition was referred for hearing to a Master in Chancery. He found that the charges in the intervening petition contained were groundless. The court, upon the coming in of the Master's report, allowed the receiver further compensation in the sum of $850.00; refused to make further allowance for his solicitors; and denied the prayer of Mitchell's petition.

respective clients as recommended by the lower court, but the fees which should be paid it is not.

In October 16, 1917, the court referred all claims of creditors which had not been allowed in a letter in chancery to make proofs.

On March 7, 1918, Charles C. Stowell and Lynn Lyons to file an interpleading petition in which it was stated that the clearing was filed in his behalf and for creditors unsecured creditors. In the creditors were done not [illegible] the petition charged that Thomas S. Gallagher [illegible] solicitor for the receiver in Boston and also for the defendant, and that he is connected with the receiver and his attorneys in fact the claim of Lynn Lyons and his [illegible] that claim, whereas in fact the claim was for money as [illegible] [illegible] of the defendant Company and so entitled to a preference; and that the listing judgment was the result of collusion and that the receiver was remiss in his duties in failing to contest the claim. The prayer of the petition was that the receiver between of the disposition be ordered to account for the $[illegible] paid to Lyons, and to refund the sum of $[illegible] paid to him on [illegible], that the solicitors be required to refund the sum of $[illegible] paid them as fees and that the commissioner be directed to direct the receiver for his services as those of the solicitors.

The petition was referred for hearing to a master in chancery. He found that the charges in the interpleading petition contained were groundless. The court, upon the coming in of the master's report, allowed the receiver further compensation in the sum of $800.00; released to make further allowance for his solicitors; and denied the prayer of Stowell's petition.

From this order both Mitchell and the receiver appealed.

Intervening petitioner Mitchell's first assignment of error is that the receivership was collusive; that therefore the receiver and his solicitors should go without compensation and that the $2,100.00 paid to Watson should be restored to the funds in the hands of the court for the benefit of the general creditors. If there was collusion in the institution of the proceedings, Mitchell was a party to it. He had conferred with Watson and Kirchen before the bill was filed. He approved of it being filed and was in court when the receiver was appointed. He presided at a meeting of the stockholders held pursuant to order of court. Apparently the plan was to oust Grinner & Burnett from control and effect a reorganization of the company. It failed. Had it succeeded there would undoubtedly have been no complaint about the allowance and payment of the Watson and Kirchen claims.

Much is said about the conduct of Gallagher. He represented Watson, complainant, and Kirchen, defendant. He procured an injunction restraining his own client, Kirchen, from proceeding to enforce her judgment against the company. As we see the facts, however, she was willing to be restrained. Her claim was compromised and paid. Finally, neither Watson nor Kirchen is here complaining about the impropriety of Gallagher representing both of them in the same proceeding.

It is said that the court was imposed upon by the procurement of an order to pay the Watson claim in full to the prejudice of the general creditors. Mitchell was bound to know from the bill of complaint that he was asserting a wage claim. The Master in Chancery and the court found that he was a wage claimant. What evidence was adduced in support of the claim

from this order both Mitchell and the receiver appealed.

Interpreting Whitcomb's first contention, of error is that the receivership was collusive, that the receiver and his solicitors should be without compensation and that the $2,500.00 paid to Nelson should be returned to the fund in the hands of the court for the benefit of the general creditors. If there was collusion in the institution of the proceedings, Mitchell was a party to it. He had conferred with Nelson and Kirkham before the bill was filed. He approved of it being filed and was in court when the receiver was appointed. He treated at a meeting of the principals held subsequently to enter of court. Practically the plan was to oust Nelson's interest from control and effect a reorganization of the company. If failed. Had it succeeded there could undoubtedly have been no complaint about the allowance and payment of the Nelson and Kirkham bills.

Such is a bit about the conduct of litigation. The receivership claims, counterclaims, and litigation, generally, proceeded on information respecting his own client, Kirkham, from proceeding to enforce her judgment against the company. As we see the facts, however, she was willing to be restrained. Her claim was overvalued and void. Finally, neither Nelson nor Kirkham is here complaining about the impropriety of Mitchell's representation both of them in the case presently.

It is said that the court has jurisdiction over the payment of an order in favor of the Nelson firm is full in the prejudice of the general creditors. Himself was bound to pay from the fund of creditors that he was preferring a major claim. The Master in Chancery and the court found that he was a more claimant. That relation was sufficient to maintain his claim.

does not appear. Mitchell objected to the Kirchen claim on the ground that her judgment was unjust and the product of a collusive agreement. In February, 1924, he withdrew his objection to the claim stating that she had received payment by unfair methods but that she was insolvent. The directions to the receiver to compromise and pay the Watson, Kirchen and Peterson claims were contained in one order entered October 3, 1927. The intervening petitioner therefore knew of the allowance of the Watson claim as early as 1923, yet he made no move to contest it until March, 1927. If his petition is, as he characterized it, in the nature of a bill of review, he was barred from relief by the statute of limitations. But whether this be true or not, the chancellor was fully justified in denying the prayer of the petition because of the lapse of time considered in connection with all the facts and circumstances.

The receiver has assigned cross-errors upon the record. He contends that the court erred in not allowing fees for the solicitors for the receiver as recommended by the master. In view of the irregularity in procedure in invoking the court to authorize the compromise and payment of the three claims above referred to without notice to the general creditors we are not disposed to reverse the decree and thus stamp with approval the conduct of the solicitors for the receiver. It may well be that the purchasing committee would not purchase the assets of the company without first having the three claims in question disposed of and that the assets were conserved by the settlement, but the solicitors owed the duty to the court and the receiver to proceed in an orderly way.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

does not appear. Mitchell objected to the Lawton claim on the ground that her judgment was unjust and the product of a collusive agreement. In February, 1938, he withdrew his objection to the claim stating that she had received payment by unfair methods but that she was insolvent. The directions to the receiver to compromise and pay the Lawton, Hinckes and [illegible] claims were contained in the order entered October 8, 1937. The intervening petitioner therefore knew of the allowance of the three claims as early as 1937, yet he made no move to contest it until March, 1939. If his petition is, as he characterizes it, in the nature of a bill of review, he was barred from filing it by the statute of limitations. But whether this be true or not, the chancellor was fully justified in denying the prayer of the petition because of the lapse of time considered in connection with all the facts and circumstances.

The receiver has assigned cross-errors upon the record. He contends that the court erred in not allowing fees for the solicitors for the receiver as recommended by the master. In view of the irregularity in procedure in [illegible] the court in authorizing the compromise and payment of the three claims above referred to without notice to the general creditors we are not inclined to reverse the decree and thus allow without approval the accounts of the solicitors for the receiver. It may well be that the purchasing committee would not purchase the assets of the company without first having the three claims in question disposed of and that the assets were conserved by the settlement, but the solicitors owed the duty to the court and the receiver to proceed in an orderly way.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

SULLIVAN, P.J. AND [illegible], J., CONCUR.

33004

MARY DIBBELL,

(Plaintiff) Appellee,

v.

THE CHECKER TAXI COMPANY,
a Corporation,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

252 I.A. 650

Opinion filed April 17, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

This appeal is from a judgment for $[illegible],500.00, for personal injuries received by the plaintiff Mary Dibbell, while riding as a passenger in a taxicab operated by the defendant, The Checker Taxi Company, a corporation.

From the facts it appears that the taxicab in which plaintiff was riding was proceeding along Sheridan Road, a boulevard in the City of Chicago, at about 45 miles an hour and ran into a concrete post in the center of the street with sufficient force to break the post and split the concrete abutment, demolishing the front of the car, knocking loose the motor block, bending the front seat and throwing the plaintiff forward against the partition separating the driver's seat from that part of the car provided for passengers.

Plaintiff testified that she knew nothing after the accident until she was being carried out of the cab into the hospital. The liability of the defendant is admitted and the two principal grounds relied upon for reversal are that the damages are excessive and that the jury was guilty of misconduct in arriving at its verdict in the case.

Opinion filed April 17, 1929

252 I.A. 650

Mr. Justice Holdom delivered the opinion of the court.

This appeal is from a judgment for $13,500.00, for personal injuries received by the plaintiff Guy Gibbons, while acting as a passenger in a motorbus operated by the defendant, The Chicago Rail Company, a corporation.

From the facts it appears that the accident in which plaintiff was injured was proceeding along Jackson Blvd., westerly in the City of Chicago, in front of cribs on four and was take a westerly road in the center of the street with sufficient force to break his neck and kill the occupants, including the front of the car, causing large the motor block, bending the front axle and breaking the plaintiff forward against the partition separating the driver's seat from that part of the car provided for passengers.

Plaintiff testified that he was unconscious after the accident until he was being carried out of the car and was taken to hospital. The liability of the defendant is conceded and the principal question raised here for reversal is that the damages are excessive and that the jury was guilty of misconduct in arriving at its verdict in the case.

It is also urged that the hypothetical questions propounded to the medical witnesses were so long and involved as to constitute error and that certain remarks of counsel for the plaintiff in his argument to the jury were not based on the evidence. As to the first of those last objections, we have examined the hypothetical question and can see no valid objection to it. As to the proposition that counsel had made remarks not based on the evidence, we find that counsel for the defendant was equally at fault.

Plaintiff, testifying in her own behalf, stated that when she arrived at the hospital there was a cut about 3 1/2 inches long above her right eye, which required 4 or 5 stitches, and that there was a deep cut and a gouged out hole in the left ankle; that she was in the hospital 4 days and from there she was assisted to the Morrison hotel, where she remained about two weeks in bed. From there she went to Canada to the home of her family, where she remained for another two weeks; that she was out of work approximately from 6 to 8 weeks; that since the accident she has suffered severe pain in her head; that there is a feeling as if there was a solid chunk inside of her head; that she suffers continually from headaches; that two teeth were knocked loose, one of which may have to be extracted, as it never tightened; that when at work, and bending over, she suffers from dizziness; that after the accident her entire body was bruised and that her shoulders were black and swollen and that she had various minor cuts on different parts of her body; that while at the hospital they applied heat to her legs and cold applications to her head for hours; that her right leg was swollen three or four times its natural size and black from the ankle to the knee; that she had great difficulty in raising

It is also argued that the hypothetical questions propounded to the medical witnesses were so long and involved as to constitute error; but this ground is remote at present for the scientist is not expected to the jury exactly as found on the evidence. In a. in first of these last objections, we have examined the hypothetical questions and are of opinion objection on it. In the cross-examination the witness had made reason is not based on the evidence, we find that counsel for the defendant was exactly as fair.

Finally, testifying in her own behalf, stated that when she arrived at the boarding house, she was "all black" in the inches long above her right eye, which resulted in a swelling, and that there was a lump not and a gouge out hole in the left ankle; that she was in the hospital 8 days and then there she was assisted to the Jackson home, where she remained about two weeks in bed. Then she was sent to Omaha to the home of her family, where she remained for another two weeks; that she did work intermittently from 1 to 3 months, but since the accident she has suffered severe pain in her head; that there is a feeling as if there was a nail about inches in her head; that she suffers constantly from headaches; that her nerve disorder; that after the accident her entire body was twisted and that her shoulders were first one inches and that she had various minor pains in different parts of her body, that while in the hospital they applied iodine to her legs and made injections in her head for nausea; that her right leg was swollen three or four times its normal size and bluish from the ankle to the knee; that she has been unfitted to resume her work.

her arm and that this condition lasted for three or four months, but that it appears now to be in fair condition; that her legs swell after she has been standing on them for any length of time and that she suffers pain from the foot, approximately half way up the leg; that her knee is stiff and when she gets up it cracks; that she still has to take hot baths at night to relieve the pain; that prior to the accident she had been in good health; that she had an operation eight years before for an internal condition, but had no other accident prior to the one involved in this suit.

Dr. Shafer, a witness called on behalf of the plaintiff, testified that he was a physician and that he examined the plaintiff at the Columbus Hospital, a day or two after the accident and found bruises over practically the entire body, mostly on the right shoulder and right extremity; that there was a traumatic abrasion above the right eye, which required stitches, and a large hematoma or blood tumor over the right scalp tissues; that he found a cut over the right foot, requiring a stitch, and pain in the vicinity of the right hip; that she complained of headaches and numbness of the scalp; that he made a diagnosis of her condition at the time and found concussion of the brain, with severe headaches and frequent unconsciousness, traumatic hematoma over the right scalp tissues, and traumatic injury to the right supra-orbital nerve.

Dr. Hessert, a witness called on behalf of the plaintiff, was asked a hypothetical question, involving practically the same facts, as to the condition of the plaintiff as stated by herself and Dr. Shafer, and testified that, in his opinion, she was suffering from concussion of the brain; that it was not necessary that there should be a fracture of the skull to produce

her era and that this condition lasted for three or four months, but that it appears now to be in fact mentioning that her long well after she has been standing on these the only length of time and that she entirely gives in from the long, correspondingly half way up the long that her back is right and also her long up it -really, that she still has to take not bribe or risks to relieve the pain; that prior to the marriage she had been in good health; that she had an operation eight years before for an internal condition, but had no other medical relative to the one involved in this suit.

Dr. Dwyer, a witness called on behalf of the defendant, testified that he was a physician and that he examined the plaintiff at the Interboro Hospital, a day or two after the accident and found bruises over anteriolly the entire body, mainly on the right shoulder and there was tenderness; that there was a traumatic arthritis along certain joints and certain muscular attitudes, and a large hematoma of blood under the right scapula; that he found a bruise on her arm the right hand, fracture of ribs, and in the vicinity of the right hip; that he concluded of lacerations and tenderness of the muscle, that he was a diagnosis of her condition in his view and found concussion of the brain, with severe bruises and fractures and traumatic neurosis, traumatic hematoma over the right scapula, and trauma to the injury to the right sacro-iliac joint.

Dr. Bennett, a witness called on behalf of the defendant, was asked a hypothetical question, involving practically the same facts, as to the probability of the plaintiff's being by herself and Dr. Dwyer, was questioned that, in his opinion, she was suffering from concussion of the brain, and it was not necessary that there should be a concurrence of two shocks to produce

such a condition, but that it could be caused by a sudden jerk or injury or violence.

There seems to be a divergence of opinion as to whether or not the plaintiff was unconscious following the accident and up to and until she arrived at the hospital, but this was a question of fact for the jury to consider, together with the other facts concerning her condition immediately following the accident. The history sheets produced from the records of the Columbus Hospital, under the heading, "Personal History" contain a statement to the effect that the patient was unconscious from the moment of the accident until she was brought to the hospital. This record was introduced in evidence by counsel for the plaintiff and with the consent of counsel for the defendant. The driver of the cab testified that she was conscious from the time of the accident until she reached the hospital. Reed, a witness on behalf of the plaintiff, who was driving past the scene of the accident and assisted the plaintiff to the hospital, testified that she was unconscious until they arrived at the hospital.

Dr. Wagner, a physician testifying on behalf of the defendant, stated that he was house surgeon at the Columbus Hospital, and had been practicing medicine for about seven years and had occasion to treat the plaintiff at the time she was brought into the hospital; that she was conscious but hysterical; that the bruises to the plaintiff were not particularly painful or serious; that the pupils of her eyes were normal and that there was no disturbance of the reflexes; that an analysis of her urine indicated kidney trouble by the presence of albumen and casts; that there was a chronic nephritis; that

much a condition, but that it could be caused by a sudden jerk or injury or violence.

There seems to be a divergence of opinion as to whether or not the plaintiff was suffering following the accident and up to and until the arrival at the hospital, but this was a question of fact for the jury to consider, that is with the other facts concerning the condition's inevitability following the accident. The history based obtained from the records of the Hamilton Hospital, under the heading, "Previous history" contains a statement to the effect that his mother was unconscious from the moment of the accident until he was brought to the hospital. This record was introduced in evidence by counsel for the plaintiff and also the counsel of record for the defendant. The driver of the car which struck and the was coming from the side of the roadway until he arrived the hospital. Had, a witness to testify of the activity, who was driving just the moment of the accident but evidence the plaintiff to the hospital, considered that the was unconscious until they arrived at the hospital.

Dr. Rogers, a witness testifying on behalf of the defendants, stated that he was the medical officer of the Hamilton Hospital, and, he was testifying concerning the injuries and his opinion as to what the condition of the time he was brought into the hospital; that he was unconscious and lapsed into; that the patient in the ambulance was not actively mental or violent; that the pulse of the patient was normal and that there was no disturbance of the respiratory, in analysis of his urine indicated kidney trouble in the presence of albumen and sugar; that there was a hypotonic condition; that

he found no symptoms of concussion of the brain.

If the facts testified to by the plaintiff and the witnesses on her behalf as to her physical condition are true, and the result attributable to the accident, the judgment is not excessive. The fact that a court might have awarded a less amount than that arrived at by the jury, is not sufficient reason for declaring the amount excessive. It is impossible to arrive at an exact calculation as to the extent of damages occasioned by injuries. Fixing the amount of the damages is a function of the jury. The result of its deliberation in arriving at the measure of damages should not be disturbed unless the amount is so grossly excessive as to indicate passion or prejudice. We cannot say that there is evidence of either passion or prejudice on the part of the jury in arriving at the amount of its verdict in this case. The jury had an opportunity to see and hear the witnesses and to observe their conduct and demeanor while testifying and was in a much better position to pass upon the truth or probability of their testimony than would a court of review.

It appears thatafter the jury had retired to consider its verdict the question of damages was discussed for some length of time and nine were in favor of awarding damages to the amount of $15,000.00 and three were in favor of fixing the amount at $12,500.00. A coin was flipped to see whether the verdict should be $12,500.00 or $15,000.00, with the result that the verdict was fixed at $15,000.00. The court permitted defendant to call the jurors as witnesses for the purpose of impeaching their own verdict. This practice should not be sanctioned. The verdict of the jury should not be impeached

he found the question of consequence at the hearing.

If the trial judge's decision to no longer consider the testimony of her daughter as to her character, coupled with the trial judge's failure to take evidence, was improper or not excessive. The fact that a victim might have a very strong bias against the defendant is not a reason for excluding the evidence. It is inappropriate to strike at an event motivation as to the extent of damages sustained by injuries. Taking the account of the damages in a hearing of the jury. The e-mail of the defendants in arriving at the amount of damages should be disregard unless the amount is so grossly excessive as to jeopardize passion or prejudice. It should say that there is evidence of either passion or prejudice on the part of the jury in arriving at the amount of the verdict in this case. The jury had an opportunity to see and hear the witnesses and to observe their demeanor while testifying and has in a more better position to see with the truth or probability of their testimony than would a court of appeals.

It appears that the jury has written an excessive verdict for punitive of damages and disregarded the measure length of time and also was in error of evidence. Despite the amount of $15,000.00 was there were no basis of finding the amount at $12,000.00. A case was filed to determine the matter should be $12,000.00 or $10,000.00, with the result that the verdict was fixed at $12,000.00. The court properly refused to rule the jurors in attempts for the purpose of increasing their own verdict. This practice should not be encouraged. The conduct of the jury should not be influenced

in the court where it is rendered, by the jurors themselves, otherwise the certainty of verdicts would be insecure and liable to be overthrown by any one of the panel. It does not appear, however, that all of the jurors were agreed upon the sum of $12,500.00; nine of them were in favor of awarding more. The court compelled a remittitur of $[illegible],500.00, fixing the amount at $12,500.00 and entered judgment upon this amount. On this state of the facts werare unable to see why the defendant would have cause to complain. None of the jurors were in favor of a less amount than this. By the action of the trial court, it is apparent that the judgment entered was for the least amount that the jury was in favor of assessing against the defendant. While the proceeding was irregular, we cannot see that there was any error in the entry of the judgment harmful to the defendant and concerning which it would be in a position to complain.

For the reasons stated in this opinion the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

MOLDOM, P.J. AND HYNES, J. CONCUR.

33053

HELEN M. HIGGINS,
Appellant,
v.
ALBIE C. DEJMEK,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

93 A

252 I.A. 650

Opinion filed April 17, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Helen M. Higgins, filed her declaration consisting of two counts, charging in the first count that the defendant Albie C. Dejmek, intending to injure the plaintiff and deprive her of the society of her husband Edward Charles Higgins, did wrongfully and wickedly debauch the said Edward Charles Higgens, while he was then and there the husband of the plaintiff and thereby alienated his affections and deprived her of his society and assistance. The second count charges the defendant with alienating the affections of plaintiff's husband and depriving her of his society and assistance. Defendant filed a plea of the general issue and the cause being reached for trial before a jury, the trial court sustained a motion at the conclusion of plaintiff's evidence to direct a verdict in favor of the defendant and the jury was so instructed. A motion for a new trial was overruled and judgment entered in favor of the defendant for costs, from which judgment this appeal is perfected.

The only testimony was that introduced on behalf of the plaintiff and from this it appears that the plaintiff was married to Edward Charles Higgins at Kalamazoo, Michigan, April 20, 1898, and lived in Chicago until March 1916, and then moved to California. Four children were born as a result of this marriage, and at the time of the trial, plaintiff was 57 years

Opinion filed April 17, 1929

Mr. JUSTICE DUNNE delivered the opinion of the court.

Plaintiff, Jessie M. Jones, filed her declaration sounding in tort, charging in the first count that the defendant Alice M. Bryant, intending to injure the plaintiff and deprive her of the society of her husband Edward Charles Bryant, did unlawfully and wrongfully induce the said Edward Charles Bryant, while he was then and there the husband of the plaintiff and living with plaintiff in affection and deprived her of his society and companionship. The second count charges the defendant with alienating the affections of plaintiff's husband and depriving her of his society and assistance. Defendant filed a plea of the general issue, the cause being tendered for trial before a jury. The trial court sustained a motion of the defendant of plaintiff's witness to direct a verdict in favor of the defendant and the jury was so instructed. A motion for a new trial was overruled and judgment entered in favor of the defendant for costs, from which judgment this appeal is prosecuted.

The only testimony was that introduced on behalf of the plaintiff and from this it appears that the plaintiff was married to Edward Charles Bryant at Kingston, Illinois, April 29, 1898, and lived in Chicago until March 1918, and then moved to California. Four children were born as a result of this marriage, and at the time of the trial, plaintiff was 57 years

of age and her husband about 61. The husband practiced law in California for a period of time and then returned to Chicago in January 1921, where he was followed by his wife and family in June of that year. They lived together until about September, 1921, when the wife returned to California where her husband joined them in 1922. He returned to Chicago in the fall of 1923 and the plaintiff also returned later in the fall of that year and went to his office where she found the defendant in company with her husband. From this time on it appears that the defendant was a constant visitor at the office and was seen there frequently. They appear to have spent a good deal of the time together and lunched together frequently, and there is testimony that in March 1925, they were seen together at the flat of the defendant and that Higgins, the husband, was seen in the living room with a smoking jacket on. Another time defendant was seen to call for Higgins and take him with her in her automobile and there is testimony to the effect that they were frequently together, both in public and in private.

On one evening the plaintiff, with two officers, watched the flat of the defendant after the defendant and the husband Higgins had arrived at the apartment and the lights were extinguished about 2:30 o'clock in the morning. The officers rang the bell and were admitted and found the defendant dressed in a night-gown and the husband Higgins with nothing on but a bathrobe. There was but one bedroom in the apartment. The bed in the apartment had the appearance of having been occupied. There is evidence that the husband Higgins had been spending his time with the defendant and not with the plaintiff and that the defendant had been heard to make statements to the effect that Higgins, the husband, did not dare to leave her.

of age and her husband about 45. The husband [illegible] for a period of time and then returned to Chicago in January 1951, where he was followed by his wife and family in June of that year. They lived together until [illegible], 1951, when the wife returned to California, where her husband joined them in 1952. He returned to Chicago in the fall of 1952 and the wife returned later to the [illegible] year and went to live with her father. The defendant is [illegible] with her husband. From this time on it appears that the defendant was a constant visitor at the home and was seen there frequently. They appear to have spent a good deal of the time together and learned neighbors frequently. In their testimony that in March 1956, they were seen together at the flat of the defendant and the husband. The husband, as seen in the living room with a smiling point of. Another time defendant was seen to call for Eugene and ride off with her in her automobile and there is testimony to the effect that they were frequently together, both in Chicago and in Wisconsin.

On the evening the deceased, with her children, reached the flat of the defendant after the defendant and the husband engage had arrived at the apartment and the lights were extinguished about 8:30 o'clock in the morning. The children from the hall and were detained and found the defendant lying in a night-gown and the husband fully clothed on the bedroom. There was but one bedroom in the apartment. The bed in the apartment had the appearance of having been occupied. There is evidence that the husband engage had been sleeping his time with the defendant and was with the deceased and that the defendant had been heard to make statements to the effect that Eugene, the husband, did not sleep in Irene's bed.

The only question to be determined on the record in this case, on the assignment of error with reference to the directing of the verdict, is as to whether the evidence offered by plaintiff, with all the reasonable inferences to be drawn therefrom, fairly tended to prove the allegations of the declaration.

The court on a motion to direct a verdict should not weigh the evidence as it does on a motion for a new trial, but should determine as to whether or not there is any evidence fairly tending to prove the allegations of the declaration. Scorden v. Taphorn, 214 Ill. App. 394.

The testimony in this case was not contradicted. There was evidence tending to support the declaration and it was error to have instructed a verdict.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HOLDOM, P.J. AND HYNES, J. CONCUR.

The only question to be considered on the record in this case, on the judgment of error, is whether the directing of the verdict, if so it further the evidence offered by plaintiff, with all the reasonable inferences to be drawn therefrom, fairly tended to leave the discretion of the defendant.

The court had a duty to direct a verdict when they weigh the evidence and it does not be a jury trial, but should determine as to whether or not there is any evidence fairly tending to prove the allegations of the complaint. Jacobs v. Dunlap, 124 Ill. App. 341.

The testimony in this case did not establish, there was evidence tending to support the contention and it was error to have instructed a verdict.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and the cause remanded for a new trial.

Reversed and remanded.

Adams, P.J. and Brady, J. concur.

33113

WALTER J. PETESCH, doing business as WALTER J. PETESCH & COMPANY,

Appellee,

v.

CHRIST L. CARLSON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

252 I.A. 650

Opinion filed April 17, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

Walter J. Petesch, doing business as Walter J. Petesch & Company, plaintiff, brought his action for commission for the sale of certain real estate situated in the City of Chicago, against the defendant Christ L. Carlson, defendant. A trial was had resulting in a verdict by the jury in favor of the plaintiff for the sum of $835.00, upon which verdict judgment was entered.

It appears from the uncontradicted testimony that the property in question was sold for $49,000.00 and that the full commission based upon that amount would be $1,670.00. It is also undisputed that the defendant paid $835.00, but the defendant seeks to defend upon the ground that there was no testimony showing the employment of the plaintiff by the defendant and that the payment was a voluntary, moral contribution. The original affidavit of defense filed in said cause stated that the defendant informed the plaintiff that there was another broker who had the exclusive agency to sell and that the defendant would not close the deal unless the plaintiff agreed to accept one-half of the commission and pay the other

[illegible] A. [illegible], doing business as [illegible] & Company,

Appellee.

v.

[illegible] C. [illegible],

Appellant.

Opinion filed April 17, 1929

Mr. Justice [illegible] delivered the opinion of the court.

Walter A. Tennes, doing business as [illegible] Tennes & Company, plaintiff, brought his action for commission for the sale of certain real estate situated in the city of Chicago, against the defendant Grant L. [illegible], defendant. A trial was had resulting in a verdict by the jury in favor of the plaintiff for the sum of $[illegible], upon which verdict judgment was entered.

It appears from the uncontradicted testimony that the property in question was sold for $[illegible] but that the full consideration based upon that amount would be $[illegible]. It is also undisputed that the defendant [illegible], but the defendant sought to defend upon the ground that there was no testimony showing the acceptance of the plaintiff by the defendant and that the payment was a voluntary, and [illegible] condition. The original affidavit of defense filed in this cause stated that the defendant informed the plaintiff that there was another broker who had the exclusive agency to sell and that the defendant would not close the deal unless the plaintiff agreed to accept one-half of the commission and pay the other

broker the balance. An amended affidavit of merits filed by the defendant denies that he listed the property with the plaintiff and denies that he agreed to pay a full commission and, for a further defense, states that he told the plaintiff that he would sell if the plaintiff would agree to accept one-half of the amount of the commission. The defendant in his testimony stated that he told the plaintiff that he would sell the property at $600.00 a foot and would pay some commission.

The testimony is uncontradicted to the effect that Petesch was a real estate broker and that he talked with the defendant about the sale of the particular piece of property in question and that the defendant told him that he would take $600.00 a foot for it; that on or about November 11, 1925, he sent a man to see the defendant and the defendant accompanied this man to plaintiff's office, where he was introduced to the purchaser of the property, which property defendant ultimately sold directly without the knowledge of the plaintiff. After the sale defendant left a check for $835.00 at the office of the plaintiff. This was one-half of the full commission to which plaintiff was entitled. Plaintiff thereupon acknowledged receipt of the check by letter and stated in the communication that it had been applied on account, leaving a balance of $835.00 still due. Objection is made to the introduction of this letter which was introduced in evidence on behalf of the plaintiff, but we are unable to see why it was not competent for the purpose of showing that the plaintiff did not consider the payment as a full satisfaction of his claim. There does not appear to have been any notation on the check to the effect that it was payment in full and, moreover, the account was a

broker the balance. My learned friend Mr. [illegible] on behalf of the defendant denies that he listed the property with the plaintiff and denies that he agreed to pay a full commission and, for a further defence, states that had he listed the property that he would pay if the plaintiff could secure a bonafide purchaser ready and able to purchase the property at the price of $[illegible] and upon the terms and conditions set out in the agreement of sale and purchase. The defendant in his testimony stated that he did not authorize the plaintiff to sell the property at $[illegible] and that he would not accept less than $[illegible] net to him.

The testimony is contradicted by the witness [illegible] who was a real estate broker and who was called by the defendant about the sale of the [illegible] place of residence in question and that the defendant said he was in needs the $[illegible] and that he [illegible] the property [illegible] to get the defendant and the defendant [illegible] this was to plaintiff's office, where he was introduced to the purchaser of the property, being apparently satisfied with the soil directly without the knowledge of the plaintiff. [illegible] the sale defendant left a check for $[illegible] at the office of the plaintiff. This was contrary to the full consideration to which plaintiff was entitled. Plaintiff therefore [illegible] receipt of the check by letter and [illegible] the contention that it has been signed on account, leaving a balance of $[illegible] still due. Objection is made to the introduction of this letter which was introduced in evidence on behalf of the plaintiff, but we are unable to see why it was not admissible for the purpose of showing that the plaintiff did not consider the payment as a full satisfaction of its claim. There was not subject to have been any objection on the ground to the effect that it was payment in full and, moreover, the account was a

liquidated account and the amount of the commission certain if the plaintiff was entitled to the full commission.

From the testimony it appears that the plaintiff discussed with the defendant the question of the sale of the property belonging to the defendant and was quoted a price and, as a matter of fact, introduced the defendant to the person who subsequently bought the property and we find in the record ample testimony to support the verdict and judgment of the trial court. We find no error in the proceeding which would warrant a reversal.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND BYNER, J. CONCUR.

illustrated answer and the cause of the collision certain if the liability was entailed to the full consistent.

From the testimony it appears that the plaintiff discussed with the defendant the question of the price of property belonging to the defendant and was unable to agree, as a matter of fact, because of the difference in the person who subsequently bought the property and in the record single testimony to support the verdict and judgment of the trial court. We find no error in the proceedings which would warrant a new trial.

For the reasons stated in this opinion, the judgment of the municipal court is affirmed.

CONCURRENT OPINION.

BOLDEN, J.A., WRIGHT, J., concurs.

33132

JOSEPH KOMINSKY and CHARLES ROSS, doing business as Economy Plumbing and Heating Co.,

Appellees,

v.

B. BORTZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

252 I.A. 650[4]

Opinion filed April 17, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiffs, Joseph Kominsky and Charles Ross, doing business as Economy Plumbing and Heating Co., brought its action against the defendant B. Bortz, to recover a balance due for labor and materials furnished on three garages erected by the defendant in the City of Chicago. A jury was waived and the cause tried by the court, resulting in a finding in favor of the plaintiffs for the sum of $1490. A judgment was entered on the finding.

Rule 19 of this court provides that the brief shall contain a terse outline of the principal points relied upon for reversal. We find no such outline of the principal points relied upon for reversal in the brief of the appellant in the cause. But one point for reversal appears under the points and authorities cited, - namely, that the judgment is invalid because of the fact that the judgment is in the singular and not in the plural. An examination of the pleadings in the case discloses the fact that they are all entitled, "Joseph Kominsky and Charles Ross, doing business as Economy Plumbing and Heating Co." There is nothing in the record showing a dismissal as to any party plaintiff. The title to the cause clearly indicates

[illegible]

[illegible] Lumber and Building Supply,
John Wallace [illegible]
Plumbing and Heating Co.,

Appellees,

v.

[illegible],

Appellant.

Opinion filed April 17, 1939

[illegible]

Plaintiffs, Joseph Lumber and Building Supply, John Wallace [illegible] Plumbing and Heating Co., brought its action against the defendant [illegible], to recover a balance due for labor and materials furnished on three projects erected by the defendant in the City of Chicago. A jury was waived and the cause tried by the court, resulting in a finding in favor of the plaintiffs for the sum of $1,[illegible]. A general was entered on the finding.

Gale is of this opinion. Contrary that the trial court contain a bare outline of the evidence which is relied upon for reversal. We find no such outline of the evidence which relied upon for reversal in the brief of the appellant in the cause. But we hold for reversal [illegible] under the rules and authorities cited, - namely, that the judgment is invalid because of the fact that the judgment is the singular and not in the plural. An examination of the pleadings in the case discloses the fact that they are all partial, "[illegible] Lumber and Building Co., John Wallace [illegible] Plumbing and Heating Co." There is nothing in the record showing a dismissal as to any party plaintiff. The [illegible] of the [illegible] [illegible]

a partnership and that the work done and materials furnished were by the plaintiffs jointly. The finding of the trial court assesses plaintiffs' (plural) damages at the sum of $1490. Judgment was entered upon this finding.

The appeal bond filed in the cause states that B. Bortz, as principal and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Joseph Kominsky and Charles Ross, trading as Economy Plumbing and Heating Co.

It is apparent from the record and the proceedings, that the judgment was in favor of the plaintiffs (plural) and not in favor of any particular one of them. Any recitals in the judgment order inconsistent with the proceedings and the finding of the trial court are, necessarily, typographical errors, and full legal effect will be given to the judgment as intended.

This court in the case of Lurie v. Brewer, 248 Ill. App. 535, said:

> "Defendant contends that the judgment is in favor of plaintiff when it should have been in the plural number. We think that taking the record altogether the judgment may be read as being in favor of the plaintiffs, for at the most it is but a clerical error. All of the recitations both in the pleadings, affidavits and other recitals, both by the plaintiffs and the defendant, refer to plaintiffs in the plural and not in the singular. Any recitals inconsistent with the foregoing are typographical errors and the legal effect thereof will be given by the court. It would be ridiculous to reverse this judgment on such a flimsy pretense that in one instance in the transcript, but not in the judgment, the plaintiffs were recited in the singular instead of the plural number."

No other reason having been assigned as ground for reversal in the brief filed herein, it is only necessary to consider the one question presented for the consideration of this court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR

a particularly sad case the work done was substantially immaterial were by the plaintiffs jointly. The finding of the trial court assessing plaintiffs' (Grant) damages at the sum of $[illegible] judgment was entered upon this finding.

The appeal then lies in the question whether that finding, as related and the United States District Court, sitting in Honolulu, as errors, not held and timely asserted upon appeal upon theory lawfully and therefore does, contrary to Hawaii law and testing 2d.

It is apparent from the record [illegible] that the judgment was in favor of the plaintiffs jointly and not in favor of any individual one of them. Any finding in the judgment order inconsistent with the conclusion as the finding of the trial court was, necessarily, [illegible] error, and that legal effect will be given to the judgment as intended.

This court in the case of [illegible] v. [illegible], 1[illegible] Hp. 323, said:

> "Defendant contends that the judgment in the form of plaintiff was it should have been in the joint number. We think that taking the record as a whole the judgment may be read as being in favor of the plaintiffs, for as the most it is but a clerical error. All of the evidence both in the pleadings, activity and other material, was by the plaintiffs and the defendant, voting as plaintiffs in the plural and not in the singular. Any ruling inconsistent with the foregoing are typographical errors and the legal effect thereof will be given by the court. It would be ridiculous to reverse this judgment on such a trifling technic that in no instance in the proceeding, but not in the judgment, the plaintiffs were treated in the singular instead of the joint number."

No other reason having been assigned as ground for reversal in the trial court herein, it is only necessary to consider the one question presented for the consideration of this court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

[illegible] [illegible]

[illegible] [illegible]

33141

MIKE ERCEGOVAC, attorney in fact for MANDA BENAKOVICS,	APPEAL FROM
Plaintiff-Appellee,	MUNICIPAL COURT
v.	
BERNATT POPOVICS,	OF CHICAGO.
Defendant-Appellant.	

252 I.A. 650

Opinion filed April 17, 1939

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim filed in this cause charges that the defendant Bernatt Popovics is indebted to the plaintiff's attorney in fact, in the sum of $400, with interest from date, upon certain contracts in writing attached to and made a part of the statement of claim. The defendant answering alleged that the contracts or notes in writing were not executed by him and that the signatures thereon were obtained by violence and duress; denies further that they were given for a valid consideration and denies that he is indebted to the plaintiff Mike Ercegovac, attorney in fact for Manda Benakovics in any amount whatsoever. The proceeding was an action on a contract of the fourth class under the Municipal Court Act. Upon being called as a witness by the plaintiff, the defendant admitted signing the four certain notes or agreements to pay the $400, together with interest at three percent, and admitted further that he had received from Manda Benakovics $500, on which he had paid back $100.

The cause was submitted to the court without a jury and a finding was made by the court in favor of the plaintiff for the sum of $499, upon which finding judgment was entered.

Opinion filed April 17, 1929

The court found specially that the notes in question, and which were introduced in evidence in support of the claim of the plaintiff, were obtained by duress and were invalid.

Evidence was introduced upon behalf of the defendant to the effect that he had entered into a verbal agreement with Manda Benakovics, by which she was to purchase a piece of property in Jugo-Slavia belonging to the defendant and that the payment of $500 was a deposit on the purchase price. It appears further from the testimony on behalf of the defendant that he prepared papers to be signed by his wife, who was then living in Jugo-Slavia, but it does not appear that they were ever so signed but that, as a matter of fact, the wife subsequently sold the property to Manda Benakovics upon different terms and under a different agreement. The $500 payment was made by Manda Benakovics to the defendant in November, 1919, and the defendant testified that sometime thereafter she demanded the return of her money and that he called at her home and she told him if he would not return her money she would kill him. This conversation was denied by others present at the time and we are unable to ascertain from the record under what facts the trial court found the notes in question were obtained by fraud and duress. There does not appear to have been such an unlawful act performed on the part of Manda Benakovics, or any one on her behalf, as would have deprived the defendant of the exercise of his free will in the making and executing of the notes in question. These notes or instruments in writing acknowledging the indebtedness appear to have been made sometime after the alleged conversation and, so far as the evidence shows, was the voluntary act of the defendant.

The Supreme Court of this State in the case of

The court found specifically that the notes in question, and which were introduced in evidence in support of the claim of the plaintiff, were obtained by fraud, and are invalid.

Evidence was introduced from behalf of the defendant to the effect that he had entered into a formal agreement with Madame Demarcelus, by which she was to undertake a course of property in Aux-Cayes belonging to the defendant and that the payment of $800 was a donation for a [illegible] [illegible]. It appears further from the testimony on behalf of the defendant that he intended matters to be aligned so his wife, who was then living in Aux-Cayes, but it does not appear that they were ever so aligned but that, as a matter of fact, the wife subsequently sold the property to Madame Demarcelus [illegible] and under a different agreement. The [illegible] was made by Madame Demarcelus on the defendant in Kingston, Jam., and the defendant testified that according [illegible] the [illegible] the return of her money and that he called at her home and she told him if he would not return her money she would sell [illegible]. This conversation was denied by Madame Demarcelus [illegible] we are unable to ascertain from the record under what [illegible] the trial court found the notes in question were obtained by fraud and duress. There does not appear to have been such as material not performed on the part of Madame Demarcelus, or any one on her behalf, as would have invited the defendant of the exercise of his free will in the making and execution of the notes in question. There seems to be testimony in writing acknowledging the indebtedness appears to have been made in a manner after the alleged conversation and, so far as the evidence shows, was the voluntary act of the defendant.

The Supreme Court of this State in the case of

Harris v. Flack, 289 Ill. 222, in its opinion has defined "duress" as follows:

> "Duress has been defined as a condition which exists where one by an unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. (14 Cyc. 1123). Mere annoyance or vexation will not constitute duress, but there must be such compulsion affecting the mind as shows that the execution of the contract or other instrument is not the voluntary act of the maker. Mitchell v. Mitchell, 267 Ill. 244; Kronmeyer v. Buck, 258 id. 586; Houston v. Smith, 248 id. 396; Hintz v. Hintz, 222 id. 248; Dorsey v. Wolcott 173 id. 539; Hagan v. Waldo, 168 id. 646."

It is urged as a further ground for reversal that this finding is inconsistent with the judgment and that no assignment of error appears in the record on behalf of the plaintiff to the finding, but it is strongly urged in appellees briefs filed herein that such finding is contrary to the evidence and in this we concur. It is also urged that the court should not have entered judgment in favor of the defendant because of the fact that it appears the money paid was a deposit under a verbal offer to purchase real estate and that, therefore, a tender of performance should have been made before the return of the deposit could be demanded by the plaintiff. It is a sufficient answer to this to say that the property in question had passed beyond the control of the defendant and that an offer of performance would have been useless. From the facts it is apparent that the defendant received the money in question, but that the property was not conveyed under the verbal agreement, and was subsequently purchased by Wanda Senakovics under a different arrangement and under different conditions. Furthermore, as a matter of justice, the plaintiff is entitled to the return of the deposit.

Martin v. Hunt, 1 Wh. 304, in the criterion he laid down "Ancora" as follows:

> "Courts have been called to a consideration which rights are by an accident act of vendor in lessee to make a contract of partner or tenant can not take effect cases which involve the existence of the existence of them will. (14 Ore. 1[illegible]). Each conclusion of varying will not conditions cases, are these were in such complicated affecting the also as those the. the economics of the contract or other conversed in and the relationship of the motive. Mitchell v. Allen, 27 Ill. 267, Kingsbury v. Dunn, 27 N. Y. 43, Gardner v. Smith, 14 Id. 8; Hicks v. Hunt, 49 Id. 46; Jackson v. Lansing 173 Id. 470; Hunter v. Jones, 18 Id. 63."

It is wrong as a matter among the reasons that the finding is inconsistent with the judgment and so involves a of error opposite in the reason as should at the disaster by the finding, but it is strongly urged in supplies the ill. Ancora that such finding is contrary to the evidence. In this we concur. It is true urged that we cannot should not have entered judgment in favor of the defendant because on the fact that it appears the money paid was a forfeit under a tender offer to purchase real estate and that, therefore, damages of performance should have been made before the payment of the deposit could be demanded of the plaintiff. It is a sufficient answer to this to say that the property in question had passed beyond the control of the defendants and that no other or more formance could have been tendered. From the facts it is apparent that the defendant received the money in question, and that the property was not conveyed under the verbal agreement, and the subsequently purchased by Hunter constituted under a different arrangement and under different conditions. Furthermore, as a matter of justice, the plaintiff is entitled to the return of the deposit.

In our view of the evidence and the record, the court arrived at a proper conclusion on the merits of the cause of action and its judgment should not be disturbed.

For the reasons stated in this opinion, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

33162

JOSEF WANDAS,
Plaintiff in Error,
v.
MORRIS GERBER,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

252 I.A. 651

Opinion filed April 17, 1939

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff, Joseph Wandas, filed his claim in the Municipal Court, alleging that the defendant, Morris Gerber, was indebted to him, the plaintiff, in the sum of $675 for real estate commissions by reason of the procurement by him of a purchaser for the property of the defendant. The cause was tried before the court without a jury, resulting in a finding in favor of the defendant, upon which finding judgment was entered for costs in favor of the defendant and against the plaintiff. From this judgment this appeal is perfected.

From the facts it appears that the plaintiff was in the real estate business and had been for a number of years; that on July 30, 1937, he was employed by the defendant to sell certain real estate and that he procured a purchaser for said property who was ready, able and willing to buy the same; that on July 30, 1937, he introduced the purchaser to the defendant; that a contract was entered into between the purchaser and the defendant on August 1, 1937, the plaintiff not being present. The defendant in his affidavit of merits denied that the plaintiff was a duly licensed broker. It appears, that there was at the time in full force and effect in the City of Chicago, a certain ordinance providing that it should be unlawful for any person,

[illegible]

[illegible],

Plaintiff in error,

v.

[illegible],

Defendant in error.

Opinion filed April 17, 1939

[illegible] delivered the opinion of the court.

Plaintiff, Joseph Sudra, filed his claim in our municipal court, alleging that the defendant, Lottie Lerner, was indebted to him, the plaintiff, in the sum of $[illegible] for real estate commissions by reason of the procurement by him of a purchaser for the property of the defendant. The cause was tried before the court without a jury, resulting in a finding in favor of the defendant, upon which finding judgment was entered for costs in favor of the defendant and against the plaintiff. From this judgment this appeal is prosecuted.

From the facts it appears that the plaintiff was in the real estate business and had been for a number of years; that on July 20, 1937, he was employed by the defendant to sell certain real estate and that he procured a purchaser for said property who was ready, able and willing to buy the same; that on July 30, 1937, he mentioned the purchaser to the defendant; that a contract was entered into between the purchaser and the defendant on August 1, 1937, the plaintiff not being present. The defendant in his affidavit of merits insisted that the plaintiff was a duly licensed broker. It appears, that there was at the time in full force and effect in the City of Chicago, a certain ordinance providing that it should be unlawful for any person,

firm or corporation to engage in the business or act in the capacity of a real estate broker without first obtaining a license therefor.

It appears from the facts and it is not denied, that plaintiff's business was that of a real estate broker as defined by the ordinance in question. It further appears that on July 20, 1927, up to and including July 30, 1927, plaintiff was operating without the required license. His work as a broker in procuring a purchaser and introducing him to the defendant was concluded within that period of time and his services fully performed. August 1st, the parties entered into the agreement with reference to the sale of the property and, on the same date, the plaintiff procured his license from the City of Chicago. It does not appear whether the contract was signed before the procurement of the license or vice versa, but, in the view we take of the case, it is not material as to which was first in order of time. The work performed by the plaintiff was during a time when he was without authority to act as a broker and, consequently, unlawful. Under such circumstances the court will not sanction his recovery.

This court in the case of Kirk v. Henry W. Rich & Co., 156 Ill. App. 483, in its opinion says:

> "The services of plaintiff were rendered before he obtained a license. It is immaterial that after the services were rendered and before the lease was executed, he took out a license. Plaintiff performed his part of his contract with defendant when he procured a person willing and able to accept a lease on the terms offered by the defendant, but his acts in the performance of the contract being unlawful, they cannot be the basis of a recovery.
>
> The license took effect from the date it was issued and cannot be given a retroactive effect so as to make valid acts of the plaintiff done between May 1 and October 30, 1907."

tate or corporation to engage in the business or act as the agent of a real estate broker without first obtaining a license therefor.

It appears from the facts and it is not denied, that plaintiff's business was that of a real estate broker as defined by the ordinance in question. It further appears that on July 20, 1927, up to and including July 30, 1927, defendant was operating without the required license. All that he did in inducing a purchaser and introducing him to the property was conducted within that period of time and actually performed. Moreover, the services rendered and the agreement with reference to the sale of the property was, in the same case, the plaintiff procured his license from the City of Chicago. It does not appear whether the contract was signed before the procurement of the license or vice versa. But, in the view we take of the case, it is not material as to which was first in order of time. The work performed by the plaintiff was continuous from the time he was without authority to act as a broker and, necessarily, unlawful. Under such circumstances the court will not assist the proceeding.

The court in the case of Gill v. Barrett, 368 Ill. 364, 368, in its opinion says:

"The services of plaintiffs were rendered before he obtained a license. It is immaterial that after the services were rendered and before the lawsuit was commenced, he took out a license. Plaintiffs' contract is part of his contract with a licensed person to procure a person willing and able to accept a lease on the terms offered by the landlord, but his role in the performance of the contract being unlawful, they cannot be the basis of a recovery.

The lessee had already been the party to it when licensed broker failed to give a satisfactory effect to a made multiplex of the plaintiff's case between July 1 and October 31, 1927."

To the same effect was Hammer v. Heinsohn, General No. 32669, Opinion handed down by this court October 11, 1928, (not yet reported).

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

To the same effect see *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. Opinion issued June 29 (21 pages) Monday 21, 1965 (not yet reported).

Nor the reason stated in this opinion the judgment of the municipal court is affirmed.

Respectfully,

Robert Ellsworth.

Robert L. Ellsworth, J. Prosecutor.

33236

JAMES H. HOOPER,
Plaintiff-Appellant,
v.
ANTONI MAZUR,
Defendant-Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

252 I.A. 651

Opinion filed April 17, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff James H. Hooper, on September 8, 1926, obtained judgment by confession on a note for the sum of $514.60, against the defendant Antoni Mazur. A motion to vacate was allowed and the cause was tried before a jury and a verdict returned finding the issues in favor of the defendant, on which verdict judgment was entered and appeal taken to this court.

From the facts it appears that the plaintiff bought a certain stock of groceries, fixtures and equipment at a sale conducted by the bailiff of the Municipal Court on July 3, 1926, and entered into an agreement to re-sell this stock of goods and the equipment to the defendant for the sum of $1100.00, and received in cash as part payment at the time the sum of $640.00. There appears to be some dispute as to whether or not the keys to the premises were delivered to the defendant on this date. At the time of this agreement a formal bill of sale was executed which recited therein the articles intended to be conveyed. On On July 7th, defendant went to the place where the goods were stored and, according to his testimony and that of his witnesses, found a number of the articles missing.

Opinion filed April 17, 1962

Mr. Justice [illegible] delivered the opinion of the court.

The plaintiff, James R. Lowery, on December 2, [illegible], obtained judgment by default in a suit for [illegible] against the defendant Jesse Brown. [illegible] Brown was served and the cause was tried before a jury and a verdict returned finding the issues in favor of the defendant, on which verdict judgment was entered and a [illegible] taken to this court.

From the facts it appears that the plaintiff owns a partially stock of groceries, fixtures and equipment at [illegible] conducted by the bailiff of the municipal court on July 4, [illegible], and entered into an agreement to re-sell this stock of goods and the equipment to the defendant for the sum of $[illegible], was received in cash on part payment at the time the sum of $[illegible]. There appears to be some dispute as to whether or not the keys to the premises were delivered to the defendant on this date. At the time of this agreement a formal bill of sale was executed which recited therein the attitude intended to be conveyed. On July 7th, defendant went to the store where the goods were stored and, according to his testimony and that of his witnesses, found a number of the articles missing.

From the evidence it appears that on July 7th, Hooper was informed of the fact that certain articles were missing and notified the police department that these articles had been stolen. The defendant introduced evidence to the effect that after the loss of these articles was discovered, a new agreement was entered into, under which the plaintiff undertook to procure the missing articles or, in the event he was unable so to do, then the defendant was to be released from the payment of any further amount under the agreement of July 2nd. This was denied by the defendant.

The case appears to have been tried on this theory and no objection was made by the plaintiff to the proof or the judgment entered herein on the ground of variance, until the filing of the reply brief, which under the rules of this court comes too late. The jury found the issues in favor of the defendant and we see no reason for disturbing that verdict.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P. J. AND RYNER, J. CONCUR.

From the evidence it appears that on July 7th, Cooper was informed of the fact that one of artists was missing and notified the police department that some articles had been stolen. The defendant introduced evidence to the effect that after the loss of these articles was discovered, a new agreement was entered into, under which the plaintiff undertook to procure the missing articles, in the event he was unable so to do, then the defendant was to be released from the payment of any further amount under the agreement of July 2nd. This was denied by the defendant.

The case appears to have been tried on this theory and no objection was made to the distribution to the jury of the judgment entered herein on the ground of evidence, until the filing of the reply brief, which under the rules of this court comes too late. The jury found the issues in favor of the defendant and we see no reason for disturbing that verdict.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

[illegible]

WOLCOTT, J. G. (ED CARTER, J. [illegible]

33216

SELMA CRAWFORD,
Plaintiff in Error,

vs.

SANGER BROWN et al.,
Defendants in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

252 Ill. 651

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for unlawfully restraining her liberty and detaining her in a sanitarium. The jury found the issues in plaintiff's favor and assessed her damages at one dollar. Judgment was entered on the verdict and plaintiff appeals.

The suit was started July 28, 1916, and there have been four trials. In two of them the jury disagreed and in the other the verdict was in favor of defendants. An appeal was taken to the Supreme court where the judgment was reversed and the cause remanded for a new trial (Crawford v. Brown, 321 Ill. 385), and as stated, the fourth trial resulted in a verdict and judgment in favor of plaintiff for one dollar.

The facts in the case are rather fully set out in the opinion of the Supreme court on the former appeal, so it will be unnecessary to restate them in detail here because upon the re-trial of the case the facts were substantially the same. The Supreme court held that the statute of this State in regard to lunatics did not authorize members of the family, doctors or nurses to commit a person to an institution for the insane without the judgment of a court; that the statute authorized only a temporary detention, limited to ten days, when necessary, pending an investigation; that the evidence showed that plaintiff was not insane and that it was unlawful to detain her in a sanitarium for about two weeks without authority of

BRIAN CHAPMAND,
Plaintiff in Error,

vs.

MARION FRANK et al.,
Defendants in Error.

Plaintiff brought an action against defendants to recover damages for wrongfully repossessing and thereby converting her in a conditional sale. The jury found the issues in plaintiff's favor and assessed her damages at one dollar. Defendants then moved on the verdict and plaintiff appealed.

The suit was started July 20, 1918, and tried July 23 and 24 of that year. In two of these the jury disagreed and in the third the verdict was in favor of defendants. An appeal was taken to the Appellate Court where the judgment was reversed and the cause remanded for a new trial (Chapman v. Frank, 241 Ill. App. 3). At a fourth trial the jury returned in a verdict and judgment in favor of plaintiff for one dollar.

The facts in the case are clearly stated in the opinion of the Appellate Court as follows: "It is not to be unnecessary to detail here in detail more because some of the facts of the case the facts were substantially the same. The opinion cited said that the statute of Illinois in regard to insurance authorizes members of the family, relative or agency to insure to an institution for the insane without the signature of a guardian; that the statute authorized only a temporary detention, pending ten days, when necessary, pending an investigation; that the evidence showed that plaintiff was not insane and that it was wrongful to detain her in a sanitarium for insane without the proper authority of

law. In brief compass, the evidence shows that in 1915 plaintiff and her family, consisting of her husband, her son, 26 years of age, and her daughter, 22 years of age, lived on the South side of Chicago. The husband was ill with typhoid fever and was cared for by a physician and a nurse. Plaintiff was also helping in the care of her husband and under the strain became very nervous, so much so that the required the services of the attending physician, Dr. Schwartz. He conferred with Dr. Hoag, who had formerly been the family physician, and they advised that plaintiff be taken to the Kenilworth Sanitarium conducted by defendant Brown. The nurse who had been taking care of plaintiff's husband administered morphine to plaintiff to quiet her for the trip from her home to the sanitarium, a distance of several miles. Defendant Dr. Brown owned and conducted, under a state license, the Kenilworth Sanitarium, an institution where patients were treated, most of them being of unsound mind. There were doctors and nurses employed at the sanitarium. Shortly after plaintiff was taken to the sanitarium she demandd her release, which was refused. She gave testimony to the effect that she had been badly treated by the attendants in charge of the sanitarium. She remained there about two weeks. The evidence of ill treatment was denied by a number of witnesses employed at the sanitarium, and other evidence was introduced tending to show that plaintiff was benefitted by her treatment at the sanitarium. The Supreme court held that her detention was unlawful and reversed the judgment in favor of defendants.

In the instant trial the court instructed the jury to find defendants guilty, which instruction was submitted by plaintiff, but added to this instruction the following: "because defendants had no legal right to cause the plaintiff to be restrained of her liberty without an adjudication of the mental condition of plaintiff and against her protest." Plaintiff contends that this modification

law. In brief summary, the evidence shows that in 1915 plaintiff and her family, consisting of her husband, who was 65 years of age, and her daughter, 22 years of age, lived on the South Side of Chicago. She became ill with typhoid fever and was cared for by a physician and a nurse. Plaintiff was then living in the home of her husband and under the strain became very nervous, so much so that she required the services of the attending physician, Dr. Edwards. He conferred with Dr. Moore, who had formerly been the family physician, and they advised that plaintiff be taken to the Northwestern Sanitarium conducted by defendant Brown. The husband had been taking care of plaintiff's business transactions and suggested to plaintiff to go and stay for the time being at the sanitarium, a distance of several miles. Defendant Dr. Brown owns and conducted, under a state license, the Northwestern Sanitarium, an institution where patients were treated, none of them being of unsound mind. There were doctors and nurses employed at the sanitarium. Shortly after plaintiff was taken to the sanitarium she demanded her release, which was refused. She gave testimony to the effect that she had been badly treated by the attendants in charge of the sanitarium. She remained there about two weeks. The evidence of ill treatment was denied by a number of witnesses employed at the sanitarium, and other evidence was introduced tending to show that plaintiff was benefitted by her treatment at the sanitarium. The Supreme court held that her detention was unlawful and reversed the judgment in favor of defendants.

In the instant trial the court instructed the jury to find defendants guilty, which instruction was submitted by plaintiff, but added to this instruction the following: "Because defendants had no legal right to cause the plaintiff to be restrained of her liberty without an adjudication of the mental condition of plaintiff and against her protest." Plaintiff contends that this modification

was unwarranted and that the court should have given the instruction without modification. We think the modification was proper. Under the opinion of the Supreme court plaintiff's detention at the sanitarium was held to be unlawful because, under the law, a person cannot be deprived of his liberty against his will for more than ten days without an adjudication as to his sanity, and that since there had been no such adjudication, plaintiff was entitled to a verdict. The evidence shows that plaintiff's son, 26 years old, and her daughter, 22, who was a graduate of the University of Chicago, after consultation with Doctors Schwartz and Hoag decided it was the best thing for their father and mother to have the mother placed in Dr. Brown's sanitarium, and she was accordingly sent there. Plaintiff gave testimony to the effect that this was done through the connivance of Dr. Schwartz and the nurse in charge. It is significant that although plaintiff's sister, Mrs. Schultz, was staying at plaintiff's home at the time in question, she was not called as a witness nor was plaintiff's son. Her daughter testified in rebuttal only but she was asked very little concerning the matter and no explanation appears in the record as to why these witnesses were not more fully examined in the matter.

Plaintiff contends that the court erred in admitting in evidence letters written by plaintiff's daughter to defendant Dr. Brown, and two letters written by her to her mother while she was at the sanitarium, a letter to Dr. Grant, a physician at the institution, and a letter from plaintiff's son to Dr. Brown. We think these documents were properly admitted as tending to show the good faith of defendants, and while they would not constitute a legal defense, under the opinion of the Supreme court, yet they were proper evidence for the jury on the question of damages.

Complaint is also made to the ruling of the court in refusing to permit counsel for plaintiff to examine plaintiff's

was unwarranted and that the jury should have judged the [illegible] without modification. He based his modification on grounds that opinion of the Supreme Court plaintiff's physician is inadmissible [illegible] in medical records, which the jury, [illegible] cannot be justified if the library [illegible] the jury [illegible] the jury without [illegible] as is said really, and that there had been no such objection, therefore the opinion is a verdict. The evidence shows that plaintiff's son, [illegible] and her daughter, [illegible], who was a graduate of the University of [illegible], after [illegible] it was the best [illegible] the mother [illegible] mother [illegible] in [illegible]. [illegible] said there. Plaintiff gave testimony in the [illegible] done through the [illegible] of [illegible] it is admitted that although plaintiff's [illegible], [illegible] was [illegible] at plaintiff's home [illegible] in [illegible], [illegible] called as a witness for the plaintiff's son. Her testimony [illegible] in rebuttal only [illegible] and an exhibition [illegible] were not more fully [illegible].

Plaintiff [illegible] [illegible] evidence letters written by plaintiff's daughter to [illegible] Brown, and two letters written by her to her mother, [illegible] the evidence, a letter to [illegible], a physician in the institution, and a letter from plaintiff's son to Dr. Brown. The three letter documents were [illegible] [illegible] in view the [illegible] field of defendants, and while they [illegible] a legal defense, under the opinion of the Supreme Court, yet they were proper evidence for the jury on the question of insanity.

Complaint is also made to the ruling of the court in refusing to permit counsel for plaintiff, to examine plaintiff's

daughter, who was called as a witness on rebuttal, as to whether she thought her mother was insane when she signed the contract for the mother's care at the sanitarium. We think the court might properly have permitted the examination, but in the view we take of the case, we do not believe such ruling of the court warrants a reversal of the judgment, because it is apparent that the contract signed by plaintiff's daughter and son authorizing the institution to take care of their mother was executed by them under the advice of Doctors Schwartz and Hoag. Moreover, defendants had already introduced the daughter's letter to Dr. Brown wherein she stated she did feel that her mother was insane.

We are also of the opinion that the contention made as to the conduct of defendants' counsel would not warrant us in disturbing the verdict and judgment. During the progress of the trial defendants' counsel proposed that the jury go and view the sanitarium, to which counsel for plaintiff objected and the objection was sustained. We are of the opinion that the jurors, who are presumed to have the qualifications required by the statute, would not be affected by this matter.

Complaint is also made that the court erred in instructing the jury as requested by defendants. Instruction 5, complained of, told the jury that one mode of impeaching a witness was by showing that the witness had made different and contradictory statements on former occasions and that if the jury believed from the evidence that any of the witnesses had been impeached in that manner, they had a right to take that fact into consideration in weighing the testimony of such witness or witnesses. The argument made against this instruction is that while it has been approved in the case of Day v. Sampsell, 146 Ill. App. 84, yet it is not correct in saying that a witness may be impeached by showing that he made different statements on other occasions, "but that proof of such contradictory

daughter, who was called as a witness on rebuttal, as it appears as though her answer was [illegible] than she might [illegible] her mother's part of the conclusion. We think the court might properly have permitted the stipulation, but in the view we take of the case, we do not believe such ruling of the court requires a reversal of the judgment, because it is apparent that the defendants claimed the plaintiff's daughter was not supporting the intervenor, or took care of their mother was supported by them under the advice of George Lowenthal and Mann. Moreover, defendants did [illegible] introduce the complainant's letter to Mr. Brown [illegible] she did [illegible] that her mother was insane.

We are also of the opinion that the objection made as to the conduct of defendants' counsel would not warrant us in disturbing the verdict and judgment. During the progress of the trial defendants' counsel proposed that the jury [illegible] and view the penitentiary, to which counsel for plaintiff objected and the objection was sustained. We are of the opinion that the jurors, who are presumed to have the qualifications required by the statute, would not be affected by this matter.

Complaint is also made that the court erred in instructing the jury as requested by defendants. Instruction 5, complained of, told the jury that one mode of impeaching a witness was by showing that the witness had made different and contradictory statements on former occasions and that if the jury believed from the evidence that any of the witnesses had been impeached in that manner, they had a right to take that fact into consideration in weighing the testimony of such witness or witnesses. The argument made against this instruction is that while it has been approved in the case of Day v. [illegible], 118 Ill. App. 81, yet it is not correct in saying that a witness may be impeached by showing that he made different statements on other occasions, that that alone of such contradictory

statement merely tends to impeach." We think the argument is hypercritical and that the instruction given did not prejudicially affect plaintiff. Instruction 7 complained of, told the jury that preliminary to their being accepted and sworn to act as jurors they were examined by both sides as to their qualifications, that their answers showed that they were competent and qualified to act as jurors and that their answers to the questions put to them by counsel were binding on them until they were finally discharged in the case. We think the instruction was not subject to any objection, and it certainly cannot be said that plaintiff was injured by the giving of it. By instruction 9 the jury was told that while the law permits the plaintiff to testify in her own behalf, nevertheless the jury had the right in weighing her evidence to determine how much credence should be given to it and take into consideration the fact that she was the plaintiff and interested in the suit. A similar instruction was held to be erroneous in Hartshorn v. Hartshorn, 179 Ill. App. 421, where both plaintiff and defendant were natural persons and had testified, for the reason that it singled out the testimony of one party and made no reference to the testimony of the other, who was equally interested. We think the instruction ought not to have been given, but we are also of the opinion that the giving of this instruction ought not to work a reversal. In view of the evidence in the record, it is not every erroneous instruction that will work a reversal of a judgment.

Complaint is also made of the refusal of the court to give three instructions requested by plaintiff. By the first refused instruction plaintiff sought to have the jury told that if it found the defendants guilty and further found "that the trespass was committed by the defendant in a wanton and insulting manner and in willful disregard for the rights of the plaintiff," the jury was authorized by law to find exemplary or punitive damages which would

not only compensate plaintiff but also punish defendants. In support of this contention it it said that "it cannot be doubted that this asylum is operated in systematic defiance of the law.***" We think this statement is not warranted by the evidence. On the contrary, the evidence shows that the sanitarium was conducted under a license issued by the State of Illinois. We think the written evidence of plaintiff's daughter and son clearly indicates that under the advice of two doctors, what they did was for the best interest of their father and their mother. Moreover, the instruction referred to the defendant and not to the defendants and was apt to be misleading because the jury might assume the treatment of plaintiff was insolent. We think the instruction was properly refused.

The second refused instruction was to the effect that any person unlawfully restrained of his liberty might recover damages against the person or persons who thus restrained him, "and the damages recoverable by the plaintiff in such action are damages for the entire restraint, from the time it was first imposed, and all who wilfully participated in restraining the plaintiff in such action are liable to the plaintiff, not only for their own acts, but also for the acts of all the others in that regard." And that if the jury believed from the evidence that plaintiff was tied to a cot in her apartment and morphine administered to her by the nurse employed at plaintiff's home, then they should hold the defendant Brown liable to plaintiff "not only for the actual imprisonment of the plaintiff in his sanitarium, but also for the administration of the morphine and forcibly conveying of the plaintiff to his sanitarium." We think this instruction was clearly wrong and properly refused. The evidence shows that the defendant Brown had nothing to do with plaintiff until she was received at his sanitarium and he could in no manner be held liable for what

the nurse did at plaintiff's home. He had no connection with that matter; all the evidence shows this to be the fact.

By the third refused instruction plaintiff sought to have the jury told that when the plaintiff was in the defendant Brown's sanitarium she had a right to demand her release and to use force if necessary to obtain her freedom, and that all who forcibly prevented her from leaving were guilty of assaulting her, but that if the jury believed from the evidence that the nurses or attendants struck plaintiff or restrained her, the defendant Brown was liable, even if the jury believed that the defendant Brown did not expressly authorize such conduct and did not know that plaintiff was so treated. We think the offered instruction should not have told the jury that if the employes at the sanitarium forcibly prevented plaintiff from leaving the institution they were guilty of assaulting her. Plaintiff gave testimony to the effect that employes had physically assaulted her while at the institution, while the attendants gave testimony to the contrary. The offered instruction might lead the jury to believe plaintiff's version of the matter by telling the jury that if the attendants forcibly prevented plaintiff from leaving they were guilty of assaulting her. But in any view of the case we think we would not be warranted in reversing the judgment on account of the refusal to give this offered instruction.

Complaint is made that the remarks of the trial court were prejudicial. We think there is merit in some of the contentions made in this respect but not in all of them. The nurse employed at plaintiff's home testified on direct examination that on one afternoon plaintiff ran into her husband's room, as a result of which her husband became agitated and that there was a rise of his temperature; he was then suffering from typhoid fever. On cross-examination of this witness by counsel for plaintiff, the witness was asked, "But you will make the statement that it was unusually

the murder did at plaintiff's home. He had no conviction at that matter; all the evidence there tends to be the last.

By the total reduced instructions plaintiff wants to have the jury told that when the plaintiff was in the defendant's house's sanitarium and a place of business for business and in use force if necessary to obtain her freedom, and that all the reasonably prevented her from leaving were guilty of assaulting her, but that if the jury believed from the evidence that the duties of attendants attend plaintiff or restrained her, the defendant from her liberty, even if the jury believed that the defendant knew its act or already authorize such conduct and did not know that plaintiff was an invalid. We think the offered instruction should not have been the jury that if the employes at the sanitarium forcibly prevented plaintiff from leaving the institution they were guilty of assaulting her. Plaintiff gave testimony to the effect that employes had physically assaulted her while at the institution, while the defendants gave testimony to the contrary. The offered instruction might lead the jury to believe plaintiff's version of the matter by telling the jury that if the attendants forcibly prevented plaintiff from leaving they were guilty of assaulting her. But in any view of the case we think we would not be warranted in reversing the judgment on account of the refusal to give this offered instruction.

Complaint is made that the remarks of the trial court were prejudicial. We think there is merit in some of the exceptions made to this ground but not in all of them. The court sustained plaintiff's objection to defendant's first cross-examination that on one occasion plaintiff ran into her daughter's room, in a fright of which her husband became aroused and then there was a time of his temperature; he was then walking from typhoid fever. On cross-examination of this witness by counsel for plaintiff, the witness was asked, "Did you will have the relations, and if you commenced

high?" (referring to the husband's temperature); the court interjected that the witness had not stated that the patient's temperature was "unusually high." We think this remark of the trial court was warranted. The witness had not used the words implied in the question. Other remarks made by the trial court of which complaint is made, we think ought not to have been made, but it is unnecessary to detail them here because we are of the opinion that upon a consideration of the entire record we would not be warranted in reversing the judgment.

The evidence tended to show that under the law as announced by the Supreme court the detention of plaintiff was unwarranted, yet under the facts her detention was brought about by her own son and daughter and Dr. Hoag, against whom no complaint is made. They thought it was the proper thing to be done for the benefit of plaintiff and her husband.

Upon a consideration of the entire record, we would not be warranted in disturbing the judgment although there are some errors in the record. It is not every error that will warrant a reversal. We think we would not be warranted in awarding a new trial so that a more perfect record might be made. Lyons v. Hunter, 285 Ill. 336.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

bigby" (referring to the husband's incompetence), our court judge that the witness had not stated that the policy's insurance there was "unusually high." In this this amount of the policy would was material. The witness had not been the words in that in the question. Other remarks made by the trial court's to trial evidence is made, we think there not be more than many, but it is unnecessary to detail them here because we are of the opinion that upon a alteration of the writ remand to trial not be unjustly in-verdict the judgment.

The evidence tended to show that after the [illegible] assumed by the insurance which the determination of liability was [illegible] warranted, yet under the facts in defendant has brought [illegible] by her own and not that of her. Then, upon the [illegible] is made. They thought it was the proper thing to [illegible] the benefit of liability and her husband.

Upon a consideration of the entire record, we [illegible] not be warranted in disturbing the judgment although there are errors in the record. It is not every error that will reverse a [illegible]. We think we must not be warranted in [illegible] a new trial on that a more perfect record might be made. [illegible] 288 Ill. 386.

The judgment of the superior court of [illegible] county is affirmed.

AFFIRMED.

Bodewell and Dadant, JJ., concur.

33234

F. E. MONVILLE and S. H. LARSON,
Doing Business as MONVILLE AND LARSON,
Appellees,

vs.

ANGELONA BUOSCIO and FILOMENA BUOSCIO,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 651

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiffs, real estate brokers, brought suit against defendants to recover commissions claimed to be due them for obtaining a tenant for property owned by Filomena Buoscio, one of the defendants. The case was tried before the court without a jury and there was a finding and judgment in plaintiffs' favor for $720 and defendants appeal.

The record discloses that the defendants are husband and wife; that the wife owned a piece of real estate at Indianapolis Avenue and Avenue G, Chicago; that plaintiffs are real estate brokers and prior to the time in question had, as brokers, sold some real estate belonging to the defendants and the evidence tends to show that some time in the fall of 1925 plaintiffs were at defendants' home, and the evidence on behalf of the plaintiffs is to the effect that at that time the property in question was listed with plaintiffs to sell or to find a tenant for it; that most of the conversation at that time was between plaintiffs and Angelona Buoscio in the presence of the other defendant, his wife; that afterwards plaintiffs, as brokers, wrote letters to a number of parties who they thought might be interested in buying or leasing the premises. One of the letters was sent to the Texas Oil Company and in response to the letter a representative of that company called on plaintiffs at their office and negotiations were entered into. Sometime thereafter defendants executed a lease to the Texas Oil Company demising

Plaintiffs, real estate brokers, brought suit against defendants to recover commissions claimed to be due them for obtaining a tenant for property owned by plaintiffs' [illegible], and to the defendants. The case was tried before the court, a jury and there was a finding and judgment in plaintiffs' favor for $750 and defendants appeal.

The record discloses that the defendants are husband and wife; that the wife owned a piece of real estate in Independence Avenue and Kansas St., Oklahoma; that plaintiffs are real estate brokers and prior to the time in question had, as brokers, sold some real estate belonging to the defendants and the evidence shows it was at that same time in the fall of 1929 plaintiffs made a determined effort, and the evidence as a whole of the plaintiffs is to the effect that at that time the property in question was listed with plaintiffs for sale or as the tenant for it; that later the defendants discovered that their wife's interest in the property in question became known to the presence of the other defendant, his wife; that thereafter plaintiffs, as brokers, made inquiries as a member of inquiries as they thought might be interested in buying or renting the property. One of the inquiries was made to the Texas Oil Company and it resulted in the letter a representative of that company called on plaintiffs at their office and negotiations were entered into. Meetings followed between defendants and a lease in the Texas Oil Company building

the premises for a period of ten years. It further appears that plaintiffs did not know about the execution of the lease until some months afterwards when they demanded payment of their commissions but liability was denied.

The defendants contend, as we understand the argument, that the evidence shows that plaintiffs dealt with the defendant Angelena Buoscio while the property was owned by his wife, the other defendant, and that there is no evidence that the husband was authorized to list the property with plaintiffs so as to bind his wife. The difficulty with this contention is that there is evidence tending to show that plaintiffs had negotiations with both defendants, although most of the conversation in this respect was had by plaintiffs with the defendant husband, yet there is some evidence that the wife was present and actually took part in the listing of the property. Witnesses who represented the Texas Company gave testimony to the effect that the property in question was brought to the Texas Company's notice through a letter which it had received from plaintiffs and that as a result of this letter the Texas Company took the matter up with plaintiffs, culminating in the execution of the lease. In these circumstances we think we would not be warranted in holding that the evidence was insufficient to establish the fact that plaintiffs procured the execution of the lease.

Complaint is made that the evidence is insufficient to warrant the amount of the finding and judgment. We think the evidence on this question is rather meager, but one of the plaintiffs testified that $720 was the customary and usual real estate broker's fee for such services as were rendered by the plaintiffs in the instant case. There is further evidence to the effect that this computation was based upon the rate of charges fixed by the rules of the Real Estate Board of Chicago. We think prima facie the

the premises for a period of ten years. It further appears that plaintiffs did not know about the execution of the lease until many months afterwards when they demanded payment of their commissions but liability was denied.

The defendants contend, on the contrary, that the evidence shows that plaintiffs dealt with the defendant Angelona Bazzetta while the property was owned by his wife, the other defendant, and that there is no evidence that the matter was submitted to him for approval when it is plain he is bound by his wife. The difficulty with this contention is that there is evidence tending to show that plaintiffs had negotiations with the defendants, although most of the conversation in this respect was had by plaintiffs with the defendant husband, yet there is evidence that the wife was present and actually took part in the letting of the property. Witnesses who testified the lease contained terms favorable to the defendants were brought to the effect that the property in question was brought to the Texas Company's notice through a letter which it had received from plaintiffs and that as a result of this letter the Texas Company took the matter up with plaintiffs, with a view in the execution of the lease. In these circumstances we think we would not be warranted in holding that the evidence was insufficient to establish the fact that that plaintiffs procured the execution of the lease.

Complaint is made that the evidence is insufficient to support the amount of the finding and judgment. We think the evidence on this question is rather meager, but one of the plaintiffs testified that the usual and the customary and usual rate for such services as those rendered by the plaintiffs in the present case. There is further evidence to the effect that this commission was based upon the rate of charges fixed by the rules of the Real Estate Board of Chicago. In their rules the

evidence was sufficient and there being none to the contrary, the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

evidence and authorities and state briefly some of the features, the judgment of the municipal court of Ottawa is affirmed.

[illegible]

Maloney and Aylesworth, K.C., concur.

33333

PHILIP THULLEN,
Appellant,
vs.
JOSEPH J. KRESTOVITZ and
KAZIMER KRESTOVITZ,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 652

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On October 13, 1926, plaintiff brought suit against defendants to recover $585 which he claimed for work, labor and material furnished defendants. Defendants filed an affidavit of merits in which they denied liability. Afterwards plaintiff and the cause placed on the short cause calendar and on March 25, 1927, the cause was stricken from the short cause calendar, and the record discloses that on July 10, 1928, the cause came on for hearing but that defendants did not appear nor were they represented. A jury was then sworn, the case heard, and there was a verdict and judgment in plaintiff's favor for $585. On September 4th following the defendants moved that the judgment be vacated and set aside, and in support of the motion filed a verified petition supported by two affidavits. In opposition plaintiff filed two counter affidavits. The matter was heard on the petition and affidavits of both parties and an order was entered vacating and setting aside the judgment and plaintiff appeals.

The motion to vacate the judgment having been made more than 30 days after the judgment was entered, the court was not warranted in vacating the judgment unless a showing was made that would warrant a court of equity in setting aside the judgment. Section 21 Municipal Court act (Cahill's 1927 Statutes, page 535, paragraph 409.)

It appears from the petition and affidavits filed on behalf of defendants that on March 25, 1927, the cause was reached on

[illegible] CORPORATION,
[illegible],

vs.

JOHNSON [illegible] and
[illegible],
[illegible].

[illegible]

[illegible]

[illegible]

On October 14, 1976, plaintiff brought suit against defendants to recover [illegible] which he claimed for work, labor and material furnished defendants. Defendants filed an affidavit in which they denied liability. Afterwards plaintiff had the cause placed on the short cause calendar and on March 22, 1977, the cause was stricken from the short cause calendar, and his request dismissed that on July 20, 1978, the cause came on for hearing and that defendants did not appear but were duly represented. A jury was then sworn, the case heard, and there was a verdict and judgment in plaintiff's favor for $[illegible]. On September [illegible] following the defendants moved that the judgment be vacated and set aside, and in support of the motion filed a verified petition supported by two affidavits. In opposition plaintiff filed two counter affidavits. The matter was heard on the petition and affidavits of both parties and an order was entered vacating and setting aside the judgment and plaintiff appeals.

The motion to vacate the judgment should have been made more than 30 days after the judgment was entered, the court was not authorized in vacating the judgment after a month, and was made that would warrant a court of equity in setting aside the judgment. Section 2 Smith-Hurd Court act (Smith's 1977 Statutes, page 2[illegible], paragraph [illegible]).

It appears from the petition and affidavits filed on behalf of defendants that on March 27, 1977, the cause was transmitted on

the short cause calendar before Hon. Peter A. Schwaba, on a preliminary call of the calendar, and it was then determined that the trial would take more than one hour; thereupon the court struck the cause from the short cause calendar and ordered that it be placed upon "the next jury calendar;" that notwithstanding this order of the court the clerk erroneously "made on entry on the file" of the cause that it hold its place on the regular jury calendar; that the cause never thereafter appeared on any jury calendar; that no other jury calendar was thereafter issued and that defendants had no notice or knowledge that a judgment had been entered until an execution was served, which was more than 30 days after the entry of judgment. Defendants also set up that they have a meritorious defense, the facts in this regard being stated with considerable particularity.

The opposing affidavits filed on behalf of plaintiff set up that the cause came on for trial March 25, 1927, before Judge Schwaba; that on the preliminary call counsel for the defendants stated that he believed it would be impossible to try the case within an hour; that after considerable argument the judge stated that if the case was not tried within an hour it would lose its place on the calendar, but that if plaintiff did not proceed with the trial of the case it would be put back on the regular calendar; that thereupon both parties agreed that this might be done and an order was entered by agreement; that both counsel then conferred with the clerk of the court, who made the proper entry and the case was then put back on the regular calendar and came up for trial on July 9th before Hon. John H. Lyle, another judge of the Municipal court, and that on the next day the case was tried in the absence of the defendants.

Defendants' motion to vacate the judgment came up before Hon. Charles F. McKinley, one of the judges of the Municipal court, and an order was entered on that date - September 4, 1928 - transferrin the motion to Judge Schwaba, the judge on whose call the case appeared

ship short course calculator before you. Julie J. Thomson, on a special-
ency call of the chairman, has it and been in charge of the trial
would take more than one hour; therefore the most short course the judge
from the short course calculator was adopted when it is proved upon the
most fury calculator; that notwithstanding this motion of the course
the clerk erroneously "said no" only on the list of the court that
it held the place on the regular jury calendar; that the motion
thereafter appeared on any jury calendar; that be other jury calendar
was thereafter issued and that subsequent to be action of Justice
that a judgment had been entered upon a motion the court, that
was more than 15 days after the entry of judgment. Defendants
and by that they have a meritorious defense, but fails to set for-
part being stated with sufficiently particularity.

The opposing affidavits state on behalf of [illegible]
by that the court case on its trial docket [illegible]. [illegible]
Edwards; that on the preliminary call [illegible] the defendants
stated that he believed it would be necessary to try one case [illegible]
on both, that after considerable argument the judge ordered that if
the case was not tried which on both it would have [illegible] on the
calendar, but that if plaintiff did not proceed with the trial if
the case it would be set back on the regular calendar; that thereupon
both parties agreed that this might be done and on order was entered
by agreement; that this counsel [illegible] the court,
[illegible] the regular calendar and came up for trial on that [illegible].
John D. Lyle, another judge of the municipal court, [illegible]
[illegible] by the case was tried in the absence of the defendants.

Defendants' motion to vacate the judgment came up before
him. Charles J. Kellehy, one of the judges of the municipal court,
and an order was entered on that date - September 1, 1911 - [illegible]
the motion to Judge Edwards, the judge in whose [illegible] the case appeared

for trial on the short cause calendar as above stated. Afterwards Judge Schwaba heard the matter on the petition, affidavit and counter affidavits and upon consideration of them found in favor of defendants and vacated the judgment. Judge Schwaba was familiar with what took place when the cause was stricken from the short cause calendar and was therefore in a better position than are we to judge of the truth of the allegations contained in the petitions and affidavits submitted to him on the motion to vacate the judgment. He found in favor of defendants, and it is certain that we would be unable to say that his finding is against the manifest weight of the evidence as disclosed by the petition and affidavits. It would be inequitable to permit the judgment to stand if the facts were as disclosed by the petition and affidavits filed by the defendants. They have not had their day in court although they were diligent and have a meritorious defense. Under these circumstances we would not be warranted in disturbing the order of the Municipal court vacating the judgment.

The order of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

33148

PEOPLE OF THE STATE OF ILLINOIS)
on Relation of ROBERT K. BASSETT,)
Appellant,)
vs.)
WILLIAM HALE THOMPSON et al.,)
Appellees.)

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

252 I.A. 652

MR. JUSTICE McSURSLY DELIVERED THE OPINION OF THE COURT.

The relator, Robert K. Bassett, filed a petition for a writ of mandamus seeking the restoration of a list of those who successfully passed an examination for the post of Battalion Chief of the fire department of the City of Chicago, on which his name was fourth, and which list he alleged was, on September 9, 1927, illegally cancelled. Answer was filed by the defendants and upon hearing the writ was denied; from this order he appeals.

The relator first argues here as to the power of the courts in such case to order the restoration of the list. This may be conceded. In many cases it has been held that the courts have power to prevent manifest injustice by other tribunals where the discretionary power lodged therein is so grossly and wrongfully abused as to amount to a virtual refusal to perform the duty enjoined. People ex rel. v. Errant, 229 Ill. 56; Dental Examiners v. The People, 123 Ill. 227; People ex rel. Sheppard v. Dental Examiners, 110 Ill. 180; People ex rel. Finnegan v. McBride, 226 N. Y. 252.

Does the record in the instant case present facts and circumstances which show a gross abuse of discretion amounting to manifest injustice? We hold that the answer must be in the negative. It is admitted that the relator entered the fire department of the City of Chicago after successfully passing examinations in July, 1911, and subsequently by passing promotional examinations became captain

People ex rel. Ellis et al.
on behalf of Robert E. Bennett,
Appellant,

vs.

William Hay, Chicago et al.,
Appellees.

Appeal from the Circuit Court
of Cook County.

Mr. Justice McBRIDE delivered the opinion of the court.

The relator, Robert E. Bennett, filed a petition for a writ of mandamus seeking the reinstatement of a list of persons who successfully passed an examination for the post of assistant chief of the fire department of the city of Chicago, on which his name was fourth, and which list he alleged was, on September 8, 1933, illegally terminated. Answer was filed by the defendants and upon hearing the writ was denied; from this order he appeals.

The relator first argues here as to the power of the court in such case to order the reinstatement of the list. This may be conceded. In many cases it has been held that the courts have power to prevent manifest injustice by other tribunals where the discretionary power judicial therein is so grossly and arbitrarily abused as to amount to a virtual refusal to perform the duty assigned. People ex rel. v. Ertel, 24 Ill. 64; People ex rel. Tomlinson v. The Board, 145 Ill. 267; People ex rel. Jorgensen v. Board of Appeals, 110 Ill. 180; People ex rel. Flannery v. Martin, 258 Ill. 282.

Here the record in the instant case presently finds that circumstances which show a prima facie of discretion amounting to manifest injustice. It is held that the power exist so to the superior, it is material that the relator secures the fire department as the City of Chicago after successfully passing examinations in 1933, 1934, and subsequently by placing preliminary non-civil service [illegible]

in May, 1922. In 1925 he took the promotional examination for Battalion Chief and the list of successful and eligible candidates was posted March 2, 1925, and his name was fourth on the list. The petition alleges that it has been the uniform and practical construction of the Civil Service Commission to allow the names of eligible candidates to remain on the list until further examinations have afforded new and other eligible lists, but that on September 9, 1927, Albert W. Goodrich, Fire Commissioner of Chicago, requested the Civil Service Commission to cancel the list for Battalion Chief and that thereupon the list was cancelled; that immediately thereafter four temporary or sixty day appointments to the office of Battalion Chief were made and that such temporary appointees were far below the relator on the cancelled list.

Section 10 of the Civil Service Act (Chapter 24, para. 694) provides that the Civil Service Commission "may strike off names of candidates from the register after they have remained thereon more than two years." Since December 12, 1924, there has been in force and effect a rule of the Commission as follows: "Names remaining on eligible registers for two years and one day shall continue to remain on such eligible registers, unless the same shall have been stricken therefrom by the commission." Under this statute and rule, therefore, the Commission was acting wholly within its powers in cancelling the list in question, and the courts will not interfere with the exercise of this discretion unless it should appear that such discretion was exercised in an illegal or arbitrary manner amounting to manifest injustice.

The evidence to support the allegations as to the injustice of cancelling the list is very meager. The relator testified that he talked with Thomas J. Houston, president of the Civil Service Commission, inquiring why the list was cancelled. Mr. Houston replied that it was cancelled "at the request of the Fire Commissioner"

in May, 1922. In 1923 he took the professional examination for Station Chief and the list of successful and eligible candidates was posted March 2, 1923, and his name was fourth on the list. The petition alleges that it was found the unknown and prejudicial nature of the Civil Service Commission to allow the name of eligible candidates to remain on the list until further examinations were allowed and other civil list items, but that on September 2, 1927, Albert T. Overton, then commissioner of Navigation, requested the Civil Service Commission to cancel the list for Station Chief and that thereupon the list was cancelled. The petition alleges that employees or people by appointment in the office of Station Chief were then and were such temporary appointees were from time to time the members on the unexpired list.

Section 10 of the Civil Service Act (Statutes of 1921, page 1021) provides that the Civil Service Commission "may strike off names of candidates from the register after they have remained thereon more than two years." Since December 12, 1924, there has been in force and effect a rule of the Commission as follows: "Names remaining on eligible registers for two years and one day shall continue to remain on such eligible register, unless the same shall have been stricken therefrom by the commission." Under this statute and rule, therefore, the plaintiff-relator was having wholly within its power to determine the list in question, and the courts will not interfere with the exercise of this discretion unless it should appear that such discretion was exercised in an illegal or arbitrary manner amounting to abuse of discretion.

The evidence in support the allegations as to the injustice of cancelling the list is very meager. The minister testified that he talked with James G. Fleming, president of the Civil Service Commission, inquiring why the list was cancelled. Mr. Fleming replied that it was cancelled "at the request of the wire by Commissioner

and that at a later conversation Mr. Houston said that the list was cancelled at the request of Commissioner Goodrich "so that he could make a few of his friends." Another witness testified that he had heard Commissioner Houston say that it was at the personal request of Fire Commissioner Goodrich that the lists were cancelled. Goodrich, testifying, denied that he had made any request to cancel the lists in order to have personal friends appointed to positions. In this he is supported by the testimony of Mr. Houston, who further testified that Commissioner Goodrich had called at his office and in the course of the conversation brought out that some of these lists had been up for a long time and that it would be a wise thing to hold an examination and retire some of the lists; that Houston told the Commissioner the matter would be taken up by the Commission. At the time the list for battaltion chief was cancelled certain other lists in the fire department were also cancelled; these were the list for Captains, which was about twelve years old, the list for Lieutenant, which was five years old, while the list for Battalion Chief was over two years and six months old. It also appears that after the petition was filed in this case examinations were called for the purpose of making up new lists.

The record fails to disclose any improper exercise of the powers vested in the Civil Service Commission. Most of the lists cancelled were many years old. All of them had passed the two years which under the statute and the rule was the permissible life of such lists. It would seem to have been a wise move to have new examinations and lists, and the fact that this program may have been adopted at the suggestion of the Fire Commissioner throws no suspicion whatever on the donduct of the Civil Service Commission; indeed, it would seem fitting and proper to consult with the Fire Commissioner as to the advisability of such action.

and that at a later conversation Mr. Keyes said that the line was cancelled at the request of Commissioner Pulitzer "so that he could make a few of his friends." Another witness testified that he had heard Commissioner Pulitzer say that it was at the personal request of Fire Commissioner Goodrich that the lists were suspended. Contradiction, testifying, had it that he had no idea any request had been made in order to have personal friends appointed or promoted. In this he is supported by the testimony of Mr. Kearney, who further testified that Commissioner Pulitzer had spoken at the office and in the course of the conversation expressed the fact that some of these lists had been up for a long time and that it would be a good thing to hold an examination and revise some of the lists; that Commissioner Pulitzer told the Commissioner the matter would be taken up by the Commission. At the time the list for battalion chief was cancelled captain after list in the fire department were only provisional; these were the lists for captains, which were about twenty years old, the list for lieutenant, which was five years old, while the list for battalion chief was over two years and six months old. It also appears that when the petition was filed in this case examinations were called for the purpose of making up new lists.

The record fails to disclose any improper exercise of the powers vested in the civil service commission. Some of the lists cancelled were many years old. All of them had passed the two years which under our statute are the limit for the permissible life of such lists. It would seem to have been a duty to have new examinations and lists, and the fact that the program was have been adopted at the suggestion of the civil service commission forms no question whatever on the question of the civil service commission; indeed, it would seem fitting and proper to consult with the fire commissioner as to the advisability of such action.

The fact that some four temporary battalion chiefs were appointed does not prove that the cancellation of the list was arbitrary and unjust; the most that relator claims for this is that it shows "something is wrong with the administration of the Civil Service Law in the City of Chicago." This is too indefinite to call for any interference by the courts.

The power of the Civil Service Commissioners to strike names from the lists after two years has been sustained in People v. City, 226 Ill. App. 409, in which are cited the supporting cases of Story v. Craig, 231 N. Y. 33, and Mann v. Tracy, 185 Cal. 272. See also Thomas v. City of Chicago, 273 Ill. 479; People v. Webb, 256 Ill. 364.

The record fails to support the charges made in relator's petition and the order of the Superior court denying the issuance of the writ of mandamus was proper and is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

The fact that some four separate metallic plate were supplied does not prove that the manufacturer of the lid was arbitrary and capricious; the more than reason alone for this is that it would "complicate" the trend with the administration of the civil service law in the City of Chicago." This is the intention to call for any interference by the courts.

The power of the civil service commissioners to strike names from the lists after the lists have been submitted to local r. City, 224 Ill. App. 439, in which the court approved cases of Carr v. Lynch, 221 N. Y. 78, and Quick v. Lynch, 147 App. Div. 270, has also Carson v. City of Chicago, 279 Ill. 478; Pruitt v. Cook, 284 Ill. 304.

The racing field is another for orders made in relation to petitions and the order of the superior court denying the issuance of the writ of mandamus was proper and is affirmed.

Affirmed.

O'Connor, P. J., and McSurely, J., concur.

33228

A. J. SCHINDLER,
Appellee,

vs.

WILLIAM G. McNULTY and JOHN P. McNULTY, Copartners, Doing Business as WM. G. McNULTY & BROS.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 652

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages sustained to his lot through the excavation by defendants of the adjoining lot, and upon trial by the court had judgment for $88.30, from which defendants appeal.

Only a question of fact is presented. The court could properly find that, when defendants excavated the lot adjoining plaintiff's property, it was agreed between them that if any part of plaintiff's lot should slide into the excavation defendants would restore plaintiff's property to the same condition it was in before the excavation. Defendants removed the sod from a portion of plaintiff's lot and proceeded with the excavation, as a result of which a considerable part of plaintiff's lot slid into the excavation. Thereafter defendants attempted to fill up this part of plaintiff's lot but used stones and other rubbish, to which plaintiff objected because it was not filled in with the same kind of material that was there before the excavation. For over a year plaintiff attempted to have defendants restore his lot, but without success. After his lot had remained in an unsightly condition for about a year, plaintiff proceeded to fill the excavation himself and expended $80.80 for dirt and re-seeding.

Defendants asserted that they were obligated to fill in with black dirt only for an inch or two below the level of the sod, and that when they attempted to replace the sod it had

A. J. SCHLIMAN,
Appellee.

vs.

WILLIAM G. MANLEY and JOHN P. MANLEY, copartners, doing business as W. G. MANLEY & BROS.,
Appellants.

APPEAL FROM DEFENDANTS IN COURT OF THE [illegible].

Plaintiff brought suit to recover damages resulting to his lot through the excavation by defendants of the adjoining lot, and upon trial by the court had judgment for $[illegible], from which defendants appeal.

Only a question of law is presented. The court found property line was, when defendants excavated the lot adjoining plaintiff's property, it was agreed between them that if any part of plaintiff's lot should slide into the excavation defendants would restore plaintiff's property to the same condition it was in before the excavation. Defendants removed the soil from a portion of plaintiff's lot and proceeded with the excavation, as a result of which a considerable part of plaintiff's lot slid into the excavation. Thereafter defendants dumped to fill up this part of plaintiff's lot but used stones and other rubbish, in which plaintiff objected because it was not filled in with the same kind of material that was there before the excavation. For over a year plaintiff attempted to have defendants restore his lot, but without success. After his lot had remained in an unsightly condition for about a year, plaintiff proceeded to fill the excavation himself and expended $[illegible] for this and foreseeing.

Defendants asserted that they were obligated to fill in with clean dirt only for an inch or two below the level of the lot, but that they attempted to replace the dirt it had

disappeared. Plaintiff's janitor testified that the sod which defendants had first removed had been stored on plaintiff's lot, but was so neglected that in time it rotted and that he was obliged to remove it so that it would not block the light from windows of the house. A number of witnesses testified that defendants did not restore plaintiff's lot to the same condition it was in before the excavation but attempted to fill it up with rocks and refuse.

We see no reason to disagree with the conclusion of the trial Judge that defendants did not comply with their agreement and for this reason plaintiff was obliged to restore the property at his own expense.

The court also allowed the plaintiff the item of $7.50 to replace a large pane of glass broken by defendants. It is argued that there is no direct evidence that defendants broke the glass, but plaintiff's janitor testified to the fact.

The judgment was right and is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

disappeared. Plaintiff's jacket bandaged that was and which defendants had first removed had been stored on plaintiff's lot, but was so damaged that it also is rotted and that he was obliged to remove it so that it would not block the light from windows of his house. A number of witnesses testified that defendants did not treadore plaintiff's lot in the same condition it was in before the excavation but attempted to fill it up with rocks and refuse.

We see no reason to disagree with the conclusion of the trial judge that defendants did not comply with their agreement and for this reason plaintiff was obliged to restore the property at his own expense.

The court also allowed the plaintiff the sum of $7.50 to replace a large pane of glass broken by defendants. It is argued that there is no direct evidence that defendants broke the glass, but plaintiff's jacket bandaged as the fact.

The judgment was right and is affirmed.

AFFIRMED.

O'Connor, P. J., and Laughlin, J., concur.

33279

SARAH PERLIN,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET AND SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHERN STREET RAILWAY COMPANY, Corporations operating as CHICAGO SURFACE LINES,
Appellants.

and

JULIUS CHARNOWSKY.

APPEAL FROM MUNICIPAL COURT OF COOK COUNTY.

252 I.A. 652

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries plaintiff had a verdict against all the defendants fixing the damages at $4,000. From the judgment thereon the defendants street railway companies appeal. Julius Charnowsky does not appeal.

The declaration alleged that the street car owned by the railway companies was so carelessly operated that it collided with an automobile of the defendant Charnowsky, in which plaintiff was riding as a passenger.

The accident happened on North avenue in Chicago, which avenue runs east and west. It was about six o'clock in the evening, when it was dark, in January, 1927. The collision happened between a street car running west on the north street car track and the automobile, which was going west but turned southward across the west-bound track, in front of the approaching street car, about the middle of the block.

At the close of plaintiff's case the street railway companies moved the court that the jury be instructed to find them not guilty, which motion was refused. Thereafter the railway companies did not participate in the trial either by examining witnesses or in arguing to the jury. The refusal of the trial court to direct a verdict for the street railway companies is

BEFORE THE:

Hearing.

-vs-

CHICAGO RAILWAY COMPANY, OPERATOR
CITY RAILWAY COMPANY, OPERATOR
NORTH CHICAGO STREET RAILWAY CO.
THE SOUTHSIDE STREET RAILWAY CO.
Corporations operating as United
RAPID TRANSIT LINES,
Defendants.

and

JULIUS OBERNOWSKY,

Petitioner.

MR. JULIUS OBERNOWSKY ADDRESSES THE COMMISSION IN HIS OWN BEHALF.

In an action to recover damages for personal injuries plaintiff had a verdict against the defendants from the Superior Ct. Ill. 1920. From the judgment thereon the defendants appealed to the Appellate Court. Julius Obernowsky does not appeal.

The motorman driving the car which was struck by the railway company was by statutory decision then in existence an employee of the defendant corporation, in other words, a fellow servant.

The accident happened on Metra avenue in Chicago, Illinois (the exact spot not stated). It was dark and raining in the evening, about 11 one hour, 11 (Tuesday, 1919. The collision occurred between a street car running east on the main track and the motorcycle, which was going, not on the tracks but toward south the rail-bound track to travel of the motorcycle street car, about the middle of the block.

At the place of collision the 2 street car tracks ahead comprising were the north side the 2ary be inferior to that the main tracks, which motor was darkness. Therefore, the motorcycle operator did not participate in the slight degree in measuring distances or in seeing in the dark. The evidence in the trial court is hardly a factor, for the trial judge overruling the motion to

alleged as reversible error.

The only occurrence witness on behalf of the plaintiff was the plaintiff herself. She testified that she was eighteen years old at the time of the accident; was a friend and schoolmate of the daughter of the defendant Charnowsky and had called to see her at their home on West North avenue, which was on the north side of the street between St. Louis avenue and Ballou street. The two young ladies decided to visit a friend, and Mr. Charnowsky undertook to take them to their destination in his sedan automobile which at the time was standing in front of his home at the north curb facing west. Plaintiff got in the automobile and seated herself at the left end of the rear seat. Other members of the family got into the machine and the defendant Charnowsky took the wheel to drive. Plaintiff testified that she was seated directly back of Charnowsky. As far as she remembers, she was talking with her friend when the car started; at this time she did not see any street car and did not look to see if any street car was approaching. The automobile started west and after going probably ten feet it turned left to the south. The automobile "started suddenly and stopped and then the next thing I knew was the crash. ** I do remember the fact that he cut straight across the track so that he was headed straight south across the track. That was the position he was in when the accident happened. I do not know whether the accident happened almost instantly after he got into that position. It was very shortly after." She said she did not hear any bell or gong rung by the street car nor any warning signs of any kind.

This was virtually all of the evidence offered on behalf of the plaintiff to support the allegations of her declaration as to improper management of the street car. When the motion to instruct for the street railway companies was made, the trial judge indicated that, if it were a suit brought against the street car

alleged as reasonable error.

The only eyewitness testimony on behalf of the defendant was the plaintiff herself. She testified that she was eighteen years old at the time of the accident; she a friend and acquaintance of the daughter of the defendant Bonnemeyer and had called to see her at their home on West Seventh Avenue, which was on the north side of the street between Mr. Monk's grocery and Indian Avenue. The two young ladies decided to visit a friend, and Mr. Bonnemeyer undertook to take them in their automobile to the house at which the time was standing in front of the home of the party facing east. Plaintiff sat in the automobile and Miss Bonnell at the left hand of the rear seat. After members of the family got into the machine and the engine commenced to run, the chauffeur drive. Plaintiff testified that the car then started from the Chamberlain. As for a few moments, the car had taken off, and the friend when the car started; at this time the car was on the street car and did not look to see if any street car was approaching. The automobile started east and after going approximately the feet it turned left to the south. The automobile "started suddenly and stopped and then the next thing I knew was the crash." I do remember the fact that the driver slowed down the car so that he was headed straight south across the track. That was the position he was in when the accident happened. I do not remember the accident happened shortly after he had taken his position. It was very shortly after." She said she did not know why he had or why the street car had not been working slower. Her side.

Date was virtually all of the evidence offered on behalf of the plaintiff to support the allegations of her declaration as to improper management of the street car. Then, the motion in behalf of the street railway company was made, the trial judge indicated that, if it were a matter for argument the street car

companies alone, he would be required to direct a verdict, but as there were other defendants he was of the opinion that the case should go to the jury. The motion should have been decided as if the railway companies were the only defendants. Such motions must be determined upon the record as it existed at the time the motion was made. Condon v. Schoenfeld, 214 Ill. 226; Zelezny v. Birk Bros. Brewing Co., 211 Ill. App. 282; O'Connell v. West Side Hospital, 209 Ill. App. 233; Arrigoni v. Strassheim, 207 Ill. App. 354; Dixon v. Smith-Wallace Shoe Co., 283 Ill. 234.

Considering the plaintiff's evidence, we are of the opinion that the motion of the street railway companies should have been allowed. She knew nothing about the presence of the street car and her testimony is consistent with the theory that the automobile turned across the street car tracks in the middle of the block at the time when the street car was so close that the motorman, in the exercise of ordinary care, could not bring it to a stop to avoid the collision. Indeed, the circumstances related by plaintiff more strongly support this theory than any other. It is well settled that where the alleged negligence of a servant consists of an omission of duty suddenly and unexpectedly arising, it is incumbent upon the plaintiff to show that the servant had an opportunity to become conscious of the facts giving rise to the duty and a reasonable opportunity to perform it, before the master can be held liable. C. U. T. Co. v. Browdy, 206 Ill. 615; Rack v. Chicago City Ry. Co., 173 Ill. 289; Sox v. C. C. Ry. Co., 153 Ill. App. 265. It is also the rule that, where the evidence is as consistent with one set of facts as it is with another, it has no tendency to prove either as against the other. Davier v. Kaiser, 280 Ill. 334; Condon v. Schoenfeld, 214 Ill. 226; C. U. T. Co. v. Hampe, 228 Ill. 346. If the facts proved give rise to conflicting inferences so that the choice between them is mere matter of con-

companies alone, [illegible] by [illegible] in direct a verdict, [illegible] there were other [illegible] be was of the opinion that the case should go to the jury. The [illegible] have been decided if the railway companies were the only defendants. Such motions must be determined upon the record as it stands at the time the motion was made. [illegible] v. Schoenfeld, [illegible]; [illegible] v. [illegible] Stone, [illegible], [illegible] Ap. [illegible]; [illegible] v. [illegible] Tel., [illegible] Ap. [illegible]; [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible].

Concerning the plaintiff's evidence, we are of the opinion that the motion of the street railway companies should have been sustained. The [illegible] the presence of the street car but that testimony is sufficient [illegible] Tenny and the automobile turned across the street car tracks in the middle of the block at the time when the street car was so close that the motorman, in the exercise of ordinary care, could not stop it in a way to avoid the collision. Indeed, the circumstances relied by plaintiff were strongly against this theory than any other. It is well settled that where the legal proposition of a material element of an relation of fact entirely and unequivocally clear, it is incumbent upon the plaintiff to show that his material and an opportunity to present evidence of the fact [illegible] rule to the jury and a reasonable controversy in portion [illegible], before the motion can be said illegal. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. Chicago City Ry. Co., [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] App. [illegible]. In [illegible] the rule stated, where the evidence is so [illegible] with one set of facts as it is to [illegible] amount, it has no tendency to prove either to contract the other. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]. If the facts proved give rise to conflicting inferences so that the choice between them is more matter of con-

jecture, then the plaintiff fails to prove her case. Peoria Ry. Term. Co. v. Industrial Board, 279 Ill. 352; Ohio Bldg. Vault Co. v. Industrial Board, 277 Ill. 96; Peterson & Co. v. Industrial Board, 281 Ill. 326; Libby, McNeil & Libby v. Industrial Board, 326 Ill. 293; Ryan v. Industrial Com., 329 Ill. 209; Standard Oil Co. v. Industrial Com., 322 Ill. 524.

Applying the rule as stated in these cases, we hold that the peremptory instruction to find for the defendants street railway companies should have been given and the judgment against tha appealing defendants is therefore reversed.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

jecture, that the plaintiff would be paid his wages. (Decatur [illegible] Co. v. Industrial Board, 279 Ill. 590; [illegible] Co. v. Industrial Board, 277 Ill. 96; [illegible] v. Industrial Board, 281 Ill. 340; [illegible] v. Industrial Board, 280 Ill. 223; [illegible] v. [illegible] Co., [illegible]; [illegible] Co. v. Industrial Com., 299 Ill. 421.)

Applying the rule as stated in those cases, we hold that the evidentiary limitation is [illegible] railway companies should have been given [illegible] against the appellee defendants in [illegible].

Affirmed.

O'Connor, P. J., and Matchett, J., concur.

FINDING OF FACT.

We find as a fact that there was no evidence introduced on behalf of the plaintiff tending to establish the negligence charged in plaintiff's declaration against the Chicago Railways Company, Chicago City Railway Company, Calumet & South Chicago Railway Company and the Southern Street Railway Company, corporations, operating as Chicago Surface Lines.

33279 PLEADING OF FACT.

We find as a fact that there was no [illegible] filed on behalf of the plaintiff tending to establish the allegations charged in plaintiff's declaration against the Chicago Railway Company, Chicago City Railway Company, Chicago & South Side Railway Company and the Southern Street Railway Company, corporations, operating as Chicago Surface Lines.

33321

JULIUS OPPENHEIMER,
Appellant,

vs.

THEODORE DAMNIS,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

205

252 I.A. 653

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a landlord, brought suit against his tenant, the defendant, for rent. Defendant filed a set-off and upon trial by the court plaintiff had judgment for $108.75, from which he appeals, asserting that he was entitled to more than the court allowed for rent and that the set-off was improperly allowed.

Plaintiff first took judgment by confession under the lease for rent for the months of December, 1927, and January, February, March and April, 1928, at $200 a month. This with $20 attorneys' fees gave him a judgment for $1020. Upon motion of defendant leave was given to appear and defend and an affidavit of merits and also a plea of set-off were filed. The court found that plaintiff was entitled to rent for December and January, amounting to $400, and we are of the opinion that this was proper.

The premises was a brick building with a garage in the rear. Defendant occupied the first floor as a restaurant and the second and third floors as a hotel and sublet the garage and another small building in the rear. January 5, 1928, a fire occurred on the premises. There is ample evidence that the building occupied by defendant was rendered untenantable. It was provided in the lease that -

> "In case said premises shall be rendered untenantable by fire or other casualty, lessor may at his option terminate the lease or repair said premises within thirty days, and failing to do so or upon destruction of said premises by fire the term hereby created shall cease and determine."

It is also provided that the lessee agrees -

POLICE DEPARTMENT,
Australia,

va.

PROSECUTE PARKIS,
Australia.

Mr. Justice [illegible] delivered the following judgment:

Plaintiff, a jeweller, brought this action against the tenant, the defendant, for rent. Defendant filed a set-off and upon trial by the court plaintiff had judgment for £124.7. From which he appeals, assuming that he was entitled to more than the court allowed for rent and that the set-off was improperly allowed.

Plaintiff first took possession by contractors under the leases for rent for the months of December, 1927, and January, February, March and April, 1928, at £20 a month. The plaintiff's employees' fees gave him a judgment for £20.7. Upon notice of defendant leave was given to appear and defend and to counterclaim at trial and also a plea of set-off was filed. The court found that plaintiff was entitled to rent for December and January, according to law, and we are of the opinion that this was proper.

The premises was a brick building with a shop in the rear. Defendant occupied the first floor as a residence and the ground and upper floors as a hotel and built the front and another small building in the rear. January 2, 1928, a fire occurred on the premises. There is ample evidence that the building occupied by defendant was rendered untenantable. It was provided in the lease that -

"In case said premises shall be rendered untenantable by fire or other casualty, lessor may at his option terminate the lease or repair said premises within thirty days, and failure to do so upon destruction of said premises by fire the agreement ceases and shall determine."

It is also provided that the lessee agrees -

"At termination of the lease by lapse of time or otherwise to yield up immediate possession to said lessor."

It is not disputed that the landlord made no repairs nor did anything towards making the premises tenantable during the thirty days and they were not repaired until the following May. The parties had some talk about making a new lease. These conversations took place after the expiration of thirty days from the time of the fire, but, although a new lease was drawn up, they never agreed upon terms and it was not signed. Under the provisions of the lease above quoted, when the lessor did not repair the premises within thirty days, the term of the lease ceased and ended and the tenant was bound to yield up immediate possession to the landlord.

This is not a case of constructive eviction and the rule in such cases is not applicable. The lease provided in express terms for its termination upon a certain event, which event took place. The landlord had the option either to hold the tenant for the full term of the lease by making the premises tenantable within thirty days after the fire or to terminate the lease by failing to make repairs. The failure to repair terminated the lease.

It is argued that, because the tenant's two sub-tenants remained upon the premises, there was no yielding of possession by the tenant, citing Rogers & Hall Co. v. Walden, 205 Ill. App. 415. In that case the tenant voluntarily surrendered or abandoned possession. In the instant case the lease terminated under the provision above quoted. In Carlson v. Levinson, 226 Ill. App. 104, it was held that where there was a partial eviction by the lessor, the tenant was excused from payment of the whole rent. But these were cases of constructive eviction, while in the instant case the term of the lease ended by virtue of its provisions.

Defendant testified that he has not occupied the premi-

"At termination of the lease by lapse of time or otherwise to yield up immediate possession to said lessor."

It is not disputed that the landlord made no demand nor did anything towards ending the previous tenancy during the thirty days and they were not required until the following day. The earlier two were back about making a new lease. These conversations took place after the expiration of thirty days from the time of the fire, but although a new lease was drawn up, they never agreed upon terms and it was not signed. Under the circumstances of the lease above quoted, upon the lessor's not giving the prescribed notice within thirty days, the term of the lease ceased and ended and the tenant was bound to yield up immediate possession to the landlord.

This is not a case of constructive eviction but the rule in such cases is not applicable. The lease contained express terms for the termination upon a certain event, which event took place. The landlord had the right either to call the tenant for the full term of the lease by making the premises tenantable within thirty days after the fire or to terminate the lease by failing to make repairs. The failure to exercise terminates the lease.

It is urged that, because the tenant's the sub-lessee remained upon the premises, there was no physical of possession by the lessor, citing Pecora v. Hall 40 N. Y. Misc. 60 (1903). In that case the tenant voluntarily surrendered or abandoned possession. In the instant case the lease contained express provisions above quoted. In Kelley v. Davidson, 201 N.Y. 444, 448, it was held that where there was a partial eviction by the lessor, the tenant was excused from payment of the whole rent. In these cases of constructive eviction, unlike in the instant case the lease of the lessee ended by mutual of the parties.

Defendant contended that he has not enjoyed the premi-

see since the date of the fire, January 5th; that he has not collected any rent since that time from his sub-tenants and that thirty days after the fire, the premises not being repaired, he notified them that his lease had terminated. The landlord then could treat with the sub-tenants as he saw fit, either collecting for use and occupation or obtaining possession. Plaintiff was entitled to recover no more than $400 for rent and the judgment in that respect was proper. The defendant does not question this amount.

Defendant pleaded as a set-off, which was allowed by the court, an item of $66.30 for the cost of a barricade around the building after the fire. Defendant testified that he paid for this the next morning after the fire and informed the landlord who said it was all right. Plaintiff denied that he acquiesced in the matter and testified that defendant asked him to pay the bill but he told defendant to present it to his insurance adjuster. It is more reasonable to believe that the landlord did not agree to pay the cost of barricading the store, which was more for the benefit of the tenant than of the landlord. This item was improperly allowed as a set-off.

The court also allowed an item of $225, which was half the cost of plumbing work done in the building some eight or nine years before. This should not have been allowed for a number of reasons. When this plumbing was done in 1919, the defendant endeavored to persuade the landlord to pay the bill for same, which amounted to $450. The parties finally agreed to divide the cost, and the landlord paid $225 and the defendant paid $225, so that there was a complete settlement of that difference some eight or more years prior to the present controversy. Furthermore, the five year statute of limitations had run.

Plaintiff complains that the court did not allow him

see since the date of the fire, Jerome Ebb, who is the sub-lessee and rent since that time from his sub-lessees and their entry says after the fire, the premises not being insured, he notified them that his lease had terminated. The landlord then sued them with the sub-lessees as co-defendants, without notifying for the and consulting or obtaining permission. Plaintiff was entitled to recover as here from the rent and the defendant in that respect was proper. The defendant has not included this amount.

Defendant pleaded as a set-off, which was allowed by the court, an item of $66.30 for the cost of a partition around the building after the fire. Defendant testified that he paid for this the next morning after the fire and informed the landlord who said it was all right. Plaintiff denied defendant's testimony in the matter and testified that defendant agreed to pay the bill but he told defendant to present it to his insurance adjuster. It is more reasonable to believe that the landlord did not agree to pay the cost of partitioning the store, which was more for the benefit of the tenant than of the landlord. This item was improperly allowed as a set-off.

The court also allowed an item of $163, which was half the cost of planking work done in the building some eight or nine years before. This should not have been allowed for a number of reasons. When this planking was done in 1919, the defendant endeavored to persuade the landlord to pay the bill for same, which amounted to $326. The entire liability should be divide the most, and the landlord will not the defendant said from, so that there was a complete settlement of that difference some eight or nine years prior to the present controversy. Furthermore, the five year statute of limitations bar it.

Plaintiff complains that the court did not allow him

$20 attorneys' fees, citing Fisher v. Wecker, 210 Ill. App. 345, and Streater v. Junker, 230 Ill. App. 366. In both of these cases, upon trial on the merits, the judgment was virtually the same as was entered by confession. We can see no reason where, as in the present case, upon the trial the judgment was reduced by a large amount, that plaintiff should recover attorneys' fees.

The judgment of the trial court is reversed and judgment for the plaintiff is entered in this court for $400.

REVERSED AND JUDGMENT IN THIS COURT FOR $400.

O'Connor, P. J., and Matchett, J., concur.

650 attorneys' fees, citing Aspen v. Pepsi, 7th Cir. [illegible], and Stroger v. Yahoo, 7th Cir. [illegible]. In such a class case, upon trial on the merits, the judgment was virtually the same as was entered by conference. In our [illegible] case, as in the present case, upon the trial the plaintiff was treated by a large margin, that plaintiff should receive treatment [illegible].

The judgment of the trial court is reversed and judgment for the plaintiff is entered in this court in [illegible].

REVERSED AND JUDGMENT IS
[illegible]

O'Donnell, P. J., and Sullivan, J., concur.

33340

DENNIS J. CARROLL,
Appellee,

vs.

THOMAS J. HOUSTON, ARCHIBALD J. CAREY and EDWARD J. DENNEMARK, as Civil Service Commissioners of the City of Chicago,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

252 I.A. 653

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Petition for writ of certiorari was filed in the superior court and it was ordered that the writ issue. The respondent, the Civil Service Commission of the City of Chicago, moved to quash the writ. Upon application by the petitioner the respondent was ordered by a supplemental writ to return a transcript of the evidence taken before the commission. At final hearing the motion to quash the writ was denied and the record of the Civil Service Commission was quashed. From this order the respondent appeals.

Relator Carroll was a police captain in the Department of Police of the City of Chicago, and on June 29, 1927, was charged with violation of certain rules and regulations of the department. August 16, 1927, he was found guilty of the charges and ordered discharged from the police service. The writ of certiorari issued by the Superior court brought in review the record of the respondent and it was there held that there was no evidence to sustain the charges.

This case is in many respects a companion case to Murphy v. Houston et al., Civil Service Commissioners, recently decided by this court - 250 Ill. App. 385. Almost all of the points made in the instant case with reference to the powers of a court reviewing the proceedings of the Civil Service Commission were raised and decided in that case. We there held that the reviewing court may examine the findings and the evidence, "not

Robert T. Jackson,
Appellee,

vs.

THOMAS J. KINNEY, CHARLES J. DARRY and FRANCIS J. [illegible],
as Civil Service Commissioners
of the City of Chicago,
Appellees.

[illegible]

MR. JUSTICE [illegible] delivered the opinion of the court:

Petition for writ of certiorari was filed in the superior court and it was ordered that the writ issue. The commission, the civil service Commission of the city of Chicago, moved to quash the writ. Upon certification by the petitioner the respondent was ordered by a supplemental writ to produce a transcript of the evidence taken before the commission. At final hearing the motion to quash the writ was denied and the record of the civil Service Commission was quashed. From this order the respondent appeals.

Robert Jackson was a police sergeant in the Department of Police of the City of Chicago, and on June 24, 1937, was charged with violation of certain rules and regulations of the department. August 16, 1937, he was found guilty of the charges and ordered discharged from the police service. The writ of certiorari issued by the superior court brought up for review the record of the commission and it was there held that there was no evidence to support the charges.

This case is in many respects a parallel to the Murphy v. Chicago et al., Civil Service Commission, case, decided by this court - 361 Ill. App. 324. Among the [illegible] notice made in the instant case was that reference to the opinion of a court reviewing the proceedings of the civil service commission were taken and decided in that case. It appears that the reviewing court had reviewed the findings and the evidence, "not

for the purpose of weighing the evidence upon any material issue of fact, but in order to determine (1) whether the commission had jurisdiction; (2) whether it exceeded its jurisdiction; (3) whether there was any evidence tending to prove the charges made; and (4) whether the proceedings were conducted according to or in violation of the law." We quoted from Funkhouser v. Coffin, 301 Ill.257:

> "There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intendment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record. * * 'and the record must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order.'"

We adhere to what was held in the Murphy case as to the principal points involved. There is left in the present case only the question whether there was any evidence in the record from which the commission could reasonably find that petitioner Carroll was guilty of conduct which justified the finding of an order for his discharge. There is also in the instant case the question of laches.

Relator was charged "with conduct unbecoming a police officer or employee of the police department. Neglect of Duty. Wilful maltreatment of any person." The specific charges were that on March 5th, 6th and 7th, 1927, he had ordered divers raids to be made by his subordinate officers against certain men and women where no criminal offense was committed; that he suffered, permitted and directed officers under his commands to take part in political campaigns and suffered and permitted prostitution and the operation of houses of assignation in the district under his command, and permitted solicitation and roping for prostitution for said houses and places on the streets in his district; inability to prevent and inefficiency in the prevention of prostitution and street solicitation; inability to prevent gambling and the sale of

for the purpose of weighing the evidence upon an material issue of fact, but in order to determine (1) whether the defendants had jurisdiction; (2) whether it exceeded its jurisdiction; (3) whether there was any evidence tending to prove the charge; and (4) whether the proceedings were conducted according to or in violation of the law." He quoted from Rhodes v. Collins, 254 U.S.27:

> "There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction. Nothing is taken by intendment in favor of such jurisdiction but the facts upon which the jurisdiction is founded must appear in the record. * * 'and the record must show that the grand acted upon evidence and certain the particular upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order.'"

He adhere to what was said in the quinn case as to the principal points involved. Every is left in the present case only the question whether there was any evidence in the record from which the commission could reasonably find that petitioner Carroll was guilty of contempt which justified the issuing of an order for his discharge. There is also in the instant case the question of laches.

Petitioner was charged "with conduct constituting a public offense or employing of the police powers. Malice or duty. Willful misbehavior of any officer." The principle complaint was on March 3rd, 4th and 5th, 1927, in the district there prior to be made by his subordinate officers against various men and women there on criminal charges was dismissed; that he ordered, permitted and directed officers under his command to take part in political campaigns and meetings and prevailing prostitution and the operation of houses of assignation in the district under his command, and permitted violations and failure to prosecute for well known and places in the district; inability to prevent and inefficiency in the prevention of prostitution and street solicitation; inability to prevent gambling and the sale of

intoxicating liquors. The commission found that Carroll was guilty of:

"Conduct unbecoming a police officer or an employe of the Police Department.

"Neglect of duty.

"Incapacity or inefficiency in the service, and

"Wilful maltreatment of any person."

Respondent does not argue in its brief that there is any evidence in the record from which the commission could reasonably find that Carroll was guilty. By a supplemental record and additional abstract of record the relator has brought before this court a complete transcript of the evidence taken. The evidence is voluminous and it would unduly lengthen this opinion to attempt to set it forth.

When Carroll was transferred to 2-A District he was told by Superintendent of Police Collins that the conditions in this district were very bad, that there was vice, prostitution, gambling, dope fiends, street walkers, and other forms of degeneracy and crime, and that the superintendent was sending him there for the purpose of giving the district a thorough "cleaning up" and that he would be held responsible for "cleaning" it. This district is known as the Stanton Avenue Police District; its boundary lines are from 31st street on the north to 39th street on the south and from the railroad to the lake. A large part of the testimony relates to arrests, generally for the crimes of gambling and prostitution. The testimony, instead of proving the charges made against Carroll, shows him to have been a highly efficient and capable officer. There is no evidence whatever in the record which by any reasonable construction could be said to sustain the charges made. As was said in the Murphy case:

intoxicating liquors. The evidence found that officers had quilty of:

"Conduct unbecoming a police officer or an insult of the Police Department.

"Neglect of duty.

"Incompetency or inefficiency in the service, and

"Willful maltreatment of any prisoner."

Commissioner Rowe not arrive in its order that were no any evidence in the record from which the commission could reasonably find that Carroll was guilty. By a unanimous vote and additional charges of insult the relator's to Commissioner Rowe court a complete transcript of the evidence taken. The evidence is voluminous and it would unduly lengthen this opinion to attempt to set it forth.

Then overall was transferred to the District to was tail by Superintendent of Police Collins that the conditions in this district were very bad. Bad houses was vice, prostitution, gambling, "the flash", street walkers, and other forms of immorality and crime, so that the superintendent was sending the lieutenant for the purpose of giving the district a thorough "cleaning up" and that it would be both reasonable for "cleaning" to. Such cleaning is done as the Tenderloin house Police district; its boundary lines are from 31st street on the north to 34 on street on the south and from the railroad to the lake. A large part of the territory consists of streets, and really for the crimes of gambling and prostitution. The testimony, taken of greatly but charges made against Carroll, was a job to have been a highly efficient and worthy officer. There is no evidence whatever in the record which by any reasonable interpretation could be held to sustain the charges made. In one half of the charges

case:

"To permit a record like this to stand would amount to a nullification of ** the Civil Service Law. ** There is not a scintilla of evidence tending to show any dereliction on the part of (Captain Carroll), but on the contrary there is evidence tending to show a diligent, earnest, effective attempt in good faith to perform his duty."

The Superior court properly quashed the record of the proceedings.

The date of petitioner's discharge was August 16, 1927, and the petition for writ of certiorari was not filed until May 4, 1928, - an intervening period of almost nine months. The respondent says this constitutes laches. This point was not raised in the lower court and therefore it will not be considered in the court of review. People ex rel. O'Shea v. Lantry, 60 N.Y.S. 1009. The proper practice to raise this point is by motion to dismiss or quash the writ. Laches in applying for the writ may be waived by appearance and pleading or by making a return. 11 C.J. 148, and cases there cited.

Furthermore, there were circumstances in the instant case which reasonably could be held as excusing the delay in filing the petition for the writ.

Upon the record we hold that the order of the Superior court over-ruling respondent's motion to quash the return and quashing the record of the Civil Service Commission was proper, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

"In result a court like this should not be a
multiplication of the civil jurisdiction. It should be
not a substitute of evidence tending to show any violation
of the rule of (English Canon), but on the contrary, there
is evidence tending to show a delay, neglect, which are
attempts in good faith to restore the duty."

The Supreme court incorrectly assumes the record of
the proceedings.

The date of petitioner's discharge was December 16,
1977, and the petition for writ of habeas corpus was not filed until
May 4, 1978, - an interval of almost five months. The
respondent says this constitutes laches. This point was not
raised in the lower court and therefore it will not be considered
in the court of review. Pierce v. Yakima County, 64 S.Ct.
3, 1006. The proper practice is raise this point in motion to
dismiss or quash the writ. Laches is waived if not raised or
waived by unconscionable and wrongful or by making a return. 11 C.J.
1283, and cases there cited.

Furthermore, there were circumstances in the instant
case which reasonably could be held as excusing the delay in
filing the petition for the writ.

Upon the record as said then the order of the
Supreme court overruling respondent's motion to quash the
return and granting the record of the trial tribunal petitioner
was proper, and it is affirmed.

Concur:

O'Connor, J., J., and Rehnquist, J., dissent.

33225

JOHN URIDEL,
Appellee,
vs.
H. W. MILLER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

207

252 I.A. 653

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $76.82 entered upon the finding of the court. Plaintiff claimed that on September 3, 1926, his automobile was damaged through a collision with another automobile negligently driven by the defendant. The plaintiff has not appeared in this court.

Defendant contends that the finding is not supported by the evidence and that plaintiff was guilty of contributory negligence. Three witnesses, plaintiff, defendant and one Hollgaard, testified to the occurrence. They agree that the alleged accident occurred September 3, 1926, at the intersection of Lamon avenue and Dakin street; that plaintiff was driving a Chevrolet south on Lamon avenue and defendant was driving a Ford west on Dakin street. It was daylight but the streets were slippery.

Plaintiff says that as he approached the intersection he saw the Ford about 20 feet east of the crosswalk and that he was then about even with the north crosswalk; that defendant's automobile was on his left and that when he was in the middle of the intersection defendant's Ford struck his Chevrolet on the left side, just back of the center, head on, knocking the Chevrolet over to the southwest curb. He says that defendant then told him that it was his, defendant's, fault and that he was sorry. Grease was running out of the differential, a spring was broken and two fenders on the left side were smashed. Plaintiff drove his car home. The rear wheels did not run true, there was a grinding noise in the differential and the rear wheels were out of alignment. He had his car repaired

by the Albany Park Motor Sales Company. He says (and there is no evidence to the contrary) that the streets were about 24 feet wide and that there was a house at the northeast corner of the intersection. Plaintiff further testified that he first saw defendant's car when it was about 50 feet east of the crosswalk; that defendant was going about 35 miles an hour; and he says he and defendant together examined the damaged car.

Thilgaard on direct examination said that he was standing 20 feet north of the intersection of Lamon avenue and that he saw a Chevrolet going south 18 or 20 miles an hour; that he saw a Ford going westward at 35 miles an hour, and that he saw it when it was about 50 feet east of the crosswalk of Lamon avenue; that it struck the Chevrolet head on. He further said that defendant did not slacken his speed; that plaintiff's car was going between 15 and 18 miles an hour when it was struck; that the rear end of plaintiff's car went over the curb at the southwest corner, the front end projecting into the street. He did not see the Chevrolet after it passed him and paid no further attention to it until he heard the crash, and did not pay much attention to the Ford until it struck the Chevrolet.

Defendant testified, on the contrary, that as he approached the intersection of Lamon avenue and Bakin street he was driving about 15 miles an hour; that at 10 feet east of the crosswalk he observed the Chevrolet coming south but thought it was between 75 and 100 feet north of the crosswalk; that plaintiff's car was traveling between 30 and 35 miles an hour; that he was afraid to put on his brakes for fear he would skid, as the pavement was wet; that he therefore turned his car to the south and stopped it on Lamon avenue near the east curb. He says that he did not come in contact with plaintiff's car at any time and denied that he had admitted he was at fault. He says he could have stopped

his car within two or three feet but thought he could pass in front of plaintiff's car. He did not know whether plaintiff slackened the speed of his car but he knew that he, defendant, did not slacken his speed.

It is ap arent that the testimony of the occurrence witnesses clearly preponderates in favor of the plaintiff. Defendant contends that the physical situation as described by plaintiff and his witness was in certain respects impossible and that their testimony is therefore not entitled to credence. He says that Thilgaard's testimony to the effect that he stood 75 feet north of the intersection and saw the Ford car 50 feet east of the east crosswalk was impossible in view of the testimony that there was a house at the northeast corner of the intersection. Thilgaard's evidence as to distances was, however, only his estimate. At one time he estimated his distance from the crosswalk to be 20 feet north and at another time 75 feet. Probably neither estimate was correct, but this does not materially affect the value of his evidence with reference to what he actually saw or heard, and he testifies positively that there was a "crash" which is wholly inconsistent with defendant's theory that plaintiff's automobile was not struck at all.

Again, defendant argues that the testimony to the effect that plaintiff's car was knocked to the southwest curb with the front wheels projecting into the intersection is physically impossible and is inconsistent with the testimony of plaintiff's witness. However, the record does not disclose evidence from which this can be determined. The speed at which the cars were moving is only estimated. There is no evidence at all as to their weight nor any evidence as to the load they carried. The probabilities are that neither car was moving at the estimated speed at the time of the impact. Moreover, the evidence does

not indicate that plaintiff lost entire control of his car. While defendant denies that he admitted liability to plaintiff, there is no denial by him of a conversation with reference to a supposed injury sustained by plaintiff's car. If the cars did not collide, why the conversation?

The evidence tends to show that as plaintiff and defendant approached the crossing plaintiff had the right of way. The weight of the testimony was particularly for the trial court, who saw and heard the witnesses testify, to decide. The only question in the case is one of fact, and we cannot say that the finding is against the evidence. The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

not indicate that plaintiff had notice defect of his car. While defendant argues that the condition (liability [illegible]), [illegible] to bailed by his or a representative with reference to a motorcycle injury sustained by plaintiff's son. If the court did not initiate, why the conversation?

The evidence tends to show that on plaintiff's [illegible] defendant approached the stopping plaintiff and the client at any, the weight of the testimony was [illegible] for the total [illegible], who saw and heard the [illegible] facility, to decide. The only question in the case is one of fact, and at best, we can find the finding is against the evidence. The judgment of [illegible] affirmed.

Affirmed.

O'Connor, J. J., and Schwartz, J., concur.

33294

EMMA PALMER,
Appellee,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

2087

2521.4.653[4]

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment for plaintiff in the sum of $378 entered upon the finding of the court. Plaintiff sued as the beneficiary named in two life insurance policies issued to Victor Palmer, the son of plaintiff, on March 18, 1925, and November 24, 1926, respectively.

The statement of claim alleged that the insured departed this life on December 19, 1926; that all premiums had been paid; that plaintiff gave notice and furnished satisfactory proofs of death but that defendant refused to pay. Copies of the insurance policies were attached and the statement of claim was verified by the affidavit of plaintiff, in which she stated that her suit was upon contract for the payment of money; that the nature of the demand was as stated and that there was due to her from defendant, after allowing all just credits, deductions and set-offs, the sum of $378.

The defendant filed an amended affidavit of merits which averred the belief that defendant had a good defense to the whole demand, denied its indebtedness in any amount, demanded strict proof of the death of insured, and set up that the policies provided that they should not take effect unless upon their date the insured was in sound health, which it was averred he was not. The affidavit further set up that the terms of each of the policies provided as follows:

"Policy when void - This policy shall be void *** if the insured has been attended by any physician within two years before its date hereof, for any serious disease, complaint or operation; or has had *** disease of the heart or kidneys***."

The affidavit averred that "these policies were void because the said Victor Palmer had been attended by a physician within two years before the dates thereof for a serious disease and that the said Victor Palmer had had a disease of the heart prior to the signing of the said application for said policies referred to and prior to the date of the said policies."

Upon the trial the plaintiff gave evidence tending to show that the premiums had been paid; that Victor Palmer died at Chicago, Illinois, December 19, 1926, and that payment had been refused by defendant; that the deceased was not under the care of a physician within two years of the time of his death, with the exception of his last illness; that he was a painter and a decorator by occupation and worked continuously at his trade.

In suits upon policies containing provisions similar to these, we have held that in order to recover an affirmative proof of the fact of sound health when the policy was delivered is necessary. Lewandowski v. Western & Southern Life Ins. Co., 241 Ill. App. 55; Laughlin v. North American Benefit Corp., 244 Ill. App. 391. We hold this proof as above recited was prima facie sufficient to establish this fact.

In support of the defenses set up in the affidavit of merits, the defendant produced as a witness the attending physician. He testified that he first saw the deceased May 29, 1922; that he diagnosed his case at that time as myocarditis or heart trouble; that he next saw and treated him about a week before he died and that deceased then had influenza plus myocarditis; that his heart condition at this time was the same as when the witness first saw him; that to his recollection he had not seen the deceased between May 29, 1922, and the time when he was called in the last illness

"Today when vain - this entity should be vain ** of the
insured has been attacked by any injuries within two years
before its date hereof, for any serious disease, sickness
or operation; or one has died from disease of the heart or kidneys."

The difficulty proved that "these policies were void because the said Victor Palmer had been attended by a physician within two years before the date thereof for a serious disease, to wit, the said Victor Palmer had been a diseased at the date of the said policies in the said insurance for said policies issued to and prior to the date of the said policies."

Upon the trial, the plaintiff was relieved [illegible] show that the premiums had been paid; that Victor Palmer died at Chicago, Illinois, December 13, 1918, and that payment had been refused by defendant; that the deceased was not under the care of a physician within two years of the date of his death, with the exception of his last illness; that he was a painter and a decorator by occupation and enjoyed generally good health.

In suits upon policies containing provisions similar to these, we have held that in order to recover an affirmative proof of the fact of sound health when the policy was delivered is necessary. Langenderfer v. Indiana & Ohio Life Ins. Co., 211 Ill. App. 61; Lumpkin v. Metropolitan Life Ins. Co., 211 Ill. App. 324. We hold this proof to above evidence [illegible] sufficient to establish that fact.

In support of the defense and to show the difficulty of marine, the defendant produced as a witness the [illegible]. He testified that he first saw the deceased May 28, 1918; that he diagnosed his case at that time as appendicitis or heart trouble; that he could see and tremble the about a year before Mr. [illegible] that because that he had difficulty like appendicitis; that the heart condition of this like was the same as when the illness first set in; that to his knowledge he had not seen the deceased around May 28, 1918, and the time when he was called in the last illness

of deceased. This was the only medical evidence offered, and the fact that the deceased was afflicted with heart disease prior to the dates of the policies is practically uncontradicted.

The plaintiff rightly says, "This brings us to the only question in this case - whether the fact that insured may have had heart trouble at some time, is sufficient to avoid the policy." The provision of the policies to be construed reads:

> "This policy shall be void: (1) If the insured has been rejected for insurance by this or any other company, society or order; or has attended any hospital, or institution of any kind engaged in the care or cure of human health or disease, or has been attended by any physician, within two years <u>before the date hereof</u>, for any serious disease, complaint or operation; or has had before said date any pulmonary disease, cancer, sarcoma, or disease of the heart or kidneys; ***."

Plaintiff says that this paragraph of the policies is to be construed liberally in her favor and strictly against the company. She cites <u>Terwilliger v. National Masonic Acc. Assoc.</u>, 197 Ill. 9; <u>Kiner v. New Amsterdam Casualty Co.</u>, 220 Ill. App. 74; and <u>Davis v. Midland Cas. Co.</u>, 190 Ill. App. 338. The cases sustain her contention as to the rule which must be applied. There is no doubt of the rule nor would we be slow to follow it in cases to which it is applicable.

The proof for defendant fails to show that the insured had a disease of the heart within two years prior to the dates of the policies; and plaintiff contends that this paragraph properly construed means that the policies shall be void only in case the deceased had suffered from heart disease within two years prior to the dates upon which the policies were issued. Such, she says, is the reasonable construction and is the construction placed on it by the trial court. We should adopt the views of the trial court if possible, but an analysis of the paragraph fails to disclose any basis for this construction.

It is apparent the paragraph undertakes to state the circumstances under which the policies will be void. These are

of decedent. This was the only medical witness offered, and the fact that the decedent was suffering at the time of his death prior to the date of the policies is practically undisputed.

The liability clause, "Full Value, as it is the only question in this case - whether the firm has insured any have had heart trouble at some time, is sufficient to void the policy." The provision of the policies in controversy reads:

"This policy shall be void: (1) If the insured has been rejected for insurance by this or any other company, society or order; or has attempted any suicide, or participation of any kind engaged in the wars or some of them or aviation or aviation or has been attended by any physician, within one years prior to the date hereof, for any serious disease, complaint or condition; or has had taken medicine or prescribed treatment, except accident, or drunkenness or the bite or injury."

Already some has this contention in our policies is to be construed liberally in and favor our statutes against the company. The also Travelers v. Lightner Publishing Co., Inc., 197 Ill. 9; Grant v. New Amsterdam Casualty Co., 287 Ill. App. 74; and Davis v. Alliance Ins. Co., 287 Ill. App. 1. The same liberal construction we in the this point must be applied. There is no doubt of the rule not would we be also in doubt in it. Here is when it is applicable.

The proof for defendant fails to show that the insured had a disease at the best which was prior to the issue of the policies; and plaintiff contends that the preponderance evidence does the evidence shows he died well if ever the deceased had suffered from heart disease within the three year or the issue upon which the policies were issued. Then, we say, is the reasonable construction and in the construction placed on it by the trial court. We should judge the views of the trial court if possible, but we doubtful of the sufficient facts to determine any basis for this construction.

It is contended the surgeon authorized to write the circumstances under which the policies will be void. There are

(1) if the insured has been rejected for other insurance (apparently without any time limit as to the rejection); (2) if the insured had attended a hospital or similar institution (again, without limitation as to time); (3) if the insured had been attended by a physician (here a time limit was obviously most appropriate and it is expressed by the use of the adverbial clause, "within two years from the date hereof"); (4) if the insured had had (a) pulmonary disease, (b) cancer, (c) sarcoma, (d) disease of the heart, (e) disease of the liver. In the last clause the verb is modified by the phrase, "before said date." What is meant by "said date"? The only date theretofore mentioned is "the date hereof." "The date hereof" obviously means and refers back to the dates of the instruments, i. e., the dates of the policies. "Said date" is therefore wholly disconnected from the phrase, "within two years," which modifies the verb "attended" in the previous clause. Plaintiff's construction therefore seems to be impossible when considered from a grammatical standpoint. Moreover, looking to the whole paragraph, even a layman can discern that there probably would be a good reason why an applicant who had theretofore suffered a pulmonary disease, cancer, sarcoma or disease of the heart or kidneys should be regarded as an undesirable subject for insurance. This construction, therefore, is not unreasonable, as plaintiff argues.

While the whole paragraph should be liberally construed in favor of the plaintiff, we have no right to construe into it material statements which are inconsistent with the plain meaning of the words, the construction of the sentences, and contrary to the obvious intention. If we are right in this construction, then on the uncontradicted evidence plaintiff as a matter of law was not entitled to recover.

The court erred in finding in favor of the plaintiff and the judgment must be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

McSurely, J., concurs.

O'Connor, P. J., dissents.

(a) if the insured has been rejected for other insurance (apparently without any time limit as to the rejection); (b) if the insured had attended a hospital or similar institution (again, without limitation as to time); (c) if the insured had been attended by a physician (here a time limit was obviously more appropriate and it is significantly the use of the adverbial clause, "within two years last past the date hereof"); (d) if the insured has had (a) pulmonary disease, (b) cancer, (c) sarcoma, (d) disease of the heart, (e) disease of the liver. In the last clause the term is modified by the phrase "prior to said date." What is meant by "said date"? The only date heretofore mentioned is "the date hereof." "The date hereof" obviously can only refer back to the dates of the instruments, i. e., the policies in question. "Said date" is therefore wholly disconnected from the words "within two years," which modifies the word "attended" in the preceding clause. Plaintiff's construction, therefore, seems to be strained, being considered from a grammatical standpoint. Moreover, reading in the whole paragraph, even a layman can discern that there would appear to be a good reason why an applicant who had theretofore suffered a pulmonary disease, cancer, sarcoma or disease of the heart or liver would be regarded as an undesirable subject for insurance. Such construction, therefore, is not unreasonable, as plaintiff argues.

While the "doubt" provisions should be liberally construed in favor of the plaintiff, we cannot be blind to [illegible] the material statements which are inconsistent with the plain meaning of the words, the construction of the sentences, and contrary to the obvious intention. If we are right in this construction, then on the uncontradicted evidence plaintiff as a matter of law was not entitled to recover.

The court erred in finding in favor of the plaintiff and the judgment must be reversed with a new trial ordered.

[illegible]

[illegible], J., concurs.

O'Connor, P. J., dissents.

FINDING OF FACTS.

We find as facts that the policies upon which the plaintiff sues in this case provided that the same should be void in case the insured had before the dates of said policies any disease of the heart; that prior to the dates of these policies the insured, Victor Palmer, was afflicted with a disease of the heart which afterwards caused his death; that the policies by their terms were therefore void, and that plaintiff cannot recover thereon.

33303

GENERAL HIGHWAYS SYSTEM, Inc.,
Appellant,

vs.

BARTLES-MAGUIRE OIL COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

252 I.A. 653

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment in favor of the defendant, entered upon the verdict of a jury by instruction of the court at the close of plaintiff's evidence. The error assigned and argued is the direction of this verdict.

Plaintiff's declaration was in assumpsit and averred in substance that on November 26, 1923, in Cook county, Illinois, defendant gave to plaintiff an order in writing which recited that, in consideration of placing signs as "listed below", namely, defendant's advertisement along public roads leading into Milwaukee, Wisconsin, according to specification of construction and conditions printed on the reverse side of the sheet, the defendant promised to pay the plaintiff $360 "when signs are placed and a like sum monthly thereafter for thirty-six months." This order further stated that it was agreed that these signs would be placed as designated by the purchaser within the area covered by the then present system of 60 signs, and stated that the application on the former contract would cease on the date said contract became operative.

The declaration averred the execution and delivery of the contract to the plaintiff; that plaintiff undertook to place 120 signs according to the terms of the contract and that they were placed on May 27, 1924; that they were maintained continuously from the time of placing the same; and in general the performance of each and all of the terms of the contract as set forth. It further averred the defendant had not paid the money as agreed; that by the terms of the contract

GENERAL DISPLAYS PLANT, Inc.,
Appellant,

vs.

PARTS-MANUFACTURING CORPORATION,
Appellee.

[illegible]

[illegible]

[illegible]

This is an appeal by the defendant from a judgment in favor of the defendant, entered upon the verdict of a jury, by the exercise of the court on the motion of plaintiff's attorney. The error assigned was error in the directing of such verdict.

Plaintiff's declaration was in assumpsit for [illegible] in substance that on December 12, 1951, in Cook County, Illinois, defendant gave to plaintiff an order in writing which contained that, in consideration of plaintiff signs on "[illegible]", [illegible], defendant's advertisement using [illegible] [illegible] [illegible], according to specifications of advertisement [illegible] printed on the reverse side of the sheet, the defendant promised to pay the plaintiff [illegible] "when signs are placed and a time has [illegible] thereafter for [illegible]." This order further stated that it was agreed that these signs would be placed in [illegible] of the purchaser within the area covered by the [illegible] [illegible] of the signs, and stated that the [illegible] in the [illegible] [illegible] cease on the date said contract became [illegible].

The declaration averred the execution and delivery of the contract to the plaintiff; that plaintiff performed its [illegible] signs according to the terms of the contract and that they were placed on May 27, 1951; that they were [illegible] [illegible] [illegible] of placing the [illegible] and in general the performance of each and all of the terms of the contract as set forth. It further averred the defendant had not paid the money as agreed; that by the terms of the contract

it was agreed that upon failure or default of the defendant to pay any of the installments in the contract mentioned, plaintiff might, after due notice, declare the total unpaid balance immediately due and payable; that on July 27, 1926, it elected by reason of the default in payment by the defendant to declare the total unpaid balance immediately due, and notified defendant of its election.

The declaration also contained the common counts and attached thereto was an affidavit to the effect that the demand of the plaintiff was for furnishing, placing and maintaining 120 signs at $360 a month, from June 27, 1924, to June 27, 1927, and that there was due to the plaintiff from the defendant, after allowing to it just credits, deductions and set-offs, $6,480.

The defendant filed a plea of the general issue and a special plea in which it was averred that the supposed contract was void because upon the date of its execution the plaintiff corporation had failed to comply with certain statutes of the state of Wisconsin. Attached to the pleas was an affidavit of merits, asserting that defendant had a good defense on the merits to the whole of plaintiff's demand, the nature of which is as follows:

> "That the signs and structures erected pursuant to the plaintiff's supposed contract were not securely erected, nor were they maintained as agreed therein, but were permitted to deteriorate and become unsightly to such an extent as to become a detriment to defendant from an advertising standpoint, and the defendant did not default its payments until after such conditions became apparent nor until after the signs had fallen or become unsightly and after plaintiff had failed in its said undertaking.
>
> And affiant further says that the supposed contract was undertaken in Wisconsin, and was to be performed wholly within the borders of Wisconsin; that defendant was and is an Illinois corporation and had failed to comply with the Wisconsin statutes respecting foreign corporations, whereby the supposed contract was and is by the laws of Wisconsin, wholly null and void, and therefore unenforceable either by the Courts of Wisconsin or of any other state."

Upon the trial plaintiff offered in evidence the

it was agreed that upon failure or default in the payment of any one of the installments in the contract mentioned, plaintiff might, after due notice, declare the whole unpaid balance immediately due and payable; that on July 17, 1931, it elected to treat on the default in payment by the defendant to declare the whole unpaid balance immediately due, and notified defendant of its election.

The reconvention also contained the before mentioned attached thereto was an affidavit of the notice that the damage to the plaintiff was for furnishing, placing and maintaining the signs at [illegible] place, from June 27, 1930, to July 17, 1931, and that there was due to the plaintiff from the defendant, after allowing to it just credits, liquidated and unpaid, $8,445.

The defendant filed a plea of the general issue and a special plea in which it was averred that the supposed contract was void because upon the date of its execution the plaintiff corporation had failed to comply with certain statutes of the state of Wisconsin. Attached to the plea was an affidavit of merits, asserting that defendant had a good defense to the entire to the whole of plaintiff's demand, the nature of which is as follows:

> "That the signs and structures therein mentioned in the plaintiff's supposed contract were not actually erected, nor were they maintained as agreed therein, but were permitted to deteriorate and become unsightly to such an extent as to become a detriment to defendant from an advertising standpoint, and the defendant did not default its payments until after such conditions became apparent and until after the signs had ceased to become unsightly and after plaintiff had failed in its undertaking.
>
> The affiant further says that the supposed contract was undertaken in Wisconsin, and was to be performed wholly within the borders of Wisconsin; that defendant was and is an Illinois corporation, and had failed to comply with the Wisconsin statutes regarding foreign corporations, whereby the supposed contract was void in by the laws of Wisconsin, within that state, and therefore unenforceable either by the courts of Wisconsin or of any other state."

Upon the trial plaintiff offered in evidence the

written contract, proved notice to defendant of its election to declare the unpaid balance of $6,480 immediately due and payable, and called one of plaintiff's employees as a witness, who testified in a general way that the signs were manufactured in Chicago and shipped to various places in Wisconsin and Michigan.

Plaintiff then rested its case and on defendant's motion an instruction to return a verdict for defendant was given by the court.

In Cooper v. Anderson, 246 Ill. App. 1, this court, reviewing the authorities, held that when a plaintiff filed an affidavit with his declaration showing the nature of his claim, the pleas of a defendant would avail nothing except insofar as the material facts alleged therein conform to the affidavit of merits. The authorities were there collected and reviewed and the reasons for the rule stated. It is unnecessary to repeat here what is said in that opinion. We held that the rule of the Municipal court that averments of fact in a pleading which were not denied were deemed to be admitted as true, had always been enforced by the courts as an assertion of the general principle that one waives an objection which he does not state.

The defenses here set up were affirmative defenses, namely, that the contract was void by reason of the Wisconsin statute and that plaintiff was not entitled to recover on account of the defective way in which the contract had been performed. It was for the defendant to establish these affirmative defenses, not for the plaintiff to negative the same in the first instance.

In the condition of the pleadings the evidence for plaintiff established a prima facie case, and it was error for the court to instruct the jury to find for the defendant. For this error the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

written contract, proved notice to defendant of the plaintiff's claim, to declare the unpaid balance of $6,[illegible] immediately due and payable, and applied one of plaintiff's employees as a witness, who testified in general that the signs were manufactured in Chicago, and shipped to various places in Illinois and elsewhere.

Plaintiff then rested; defendant moved for a directed verdict in its instructions to return a verdict for defendant was given to the court.

In Gaston v. Hutchins, 144 Ill. App. 3, this court, reviewing the authorities, said that when a plaintiff, relying on affidavit with his declaration showing the nature of his claim, the place of a defendant, rests upon certain invoices or other material facts alleged therein, evidence in the affidavit of merits. The authorities were there collected and reviewed and the reason for the rule stated. It is unnecessary to repeat here what is said in that opinion. We hold that the rule of the authorities that the evidence of fact in a pleading which are not denied are deemed to be admitted as true, has always been followed by this court in an assertion of the general principle that our courts do not decide which no duty not state.

The defendant put up were affirmative defenses, namely, that the contract was void by reason of the fraudulent misrepresentations and that plaintiff was not entitled to recover on account of his defective sign in which the contract had been executed. It was for the defendant to establish these affirmative defenses, not for the plaintiff to negative the same in the first instance.

In the consideration of the pleadings and evidence in this case, we still entertain the same high opinion, and it was error for the court to instruct the jury to find for the defendant. The judgment of the Municipal Court of Chicago is reversed and the cause remanded for another trial.

Reversed and remanded.

O'Connor, P. J., and Lindsay, J., concur.

33355

JAMES T. HORTON, Administrator,)
Appellant,)
vs.) APPEAL FROM SUPERIOR COURT
) OF COOK COUNTY.
WILLIAM M. LYNCH,)
Appellee.) 252 I.A. 654

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff administrator from a judgment in favor of defendant entered upon the verdict of a jury, which was directed by the court at the close of plaintiff's evidence. The action was in case, and the declaration alleged that on July 17, 1927, the deceased, while riding in an automobile in the exercise of due care, received injuries as a result of the negligence of defendant, from which she died August 2, 1927.

The proof offered in behalf of plaintiff tended to show that about 7:30 p. m. on July 17, 1927, the deceased with her husband, the administrator, and two friends, Mr. and Mrs. Schwartz, were riding in a Ford touring car on Austin avenue, a public highway extending north and south; that the husband, James T. Horton, was driving the car on the west side of the avenue, going south, and that as he approached Wabansia avenue, another public highway extending east and west and intersecting Austin avenue, he blew the horn and slowed up to a speed of about ten or twelve miles an hour; that when he arrived at the sidewalk line he saw defendant's automobile approaching from the left upon Wabansia avenue, and that it was about ten or fifteen feet behind the east sidewalk line of Austin avenue; that defendant's car kept on coming at a speed of about twenty-five or thirty miles an hour; that the driver pulled the car in which the intestate was riding as far as he could over to the curb but was hit by defendant's car, and that Mrs. Horton thereby received the injuries from

James E. Arkin, Administrator,
Appellant,

vs.

William H. Arkin,
Appellee.

Mr. Justice Wilkerson delivered the opinion of the court.

This appeal is by the plaintiff administrator from a judgment in favor of defendant entered upon the verdict of a jury, which was directed by the court at the close of plaintiff's evidence. The action was in trover, and the declaration alleges that on July 17, 1917, the decedent, while riding in an automobile in the service of his employer, received injuries in a collision resulting in his death, from which he died August 7, 1917.

The proof offered in behalf of plaintiff tends to show that about 7:30 p. m. on that day, the decedent with his husband, the publisher, and the driver, Mr. Ben Cox, Commerce, were riding in a Ford automobile on Michigan avenue, a public highway extending north and south, from the [illegible] to Grand, from E. Morton, was driving the car in the direction of the avenue, going south, and that as he approached Chicago avenue, another public highway crossing that one west, he [illegible] motorcycle, moving eastward, he knew that both were about to be a point of about two or twenty miles an hour; that when he arrived at the intersection, he saw the motorcycle's approaching and he [illegible] the car, but that it was too late to avoid the collision; that at the time of the collision the car was moving at a speed of about [illegible] miles an hour; that the motorcycle was [illegible] the driver pulled the car to the [illegible] the motorcycle so far as he could over to the east side of the intersection, and the car, Mr. Morton, [illegible] the injuries from

which she died.

The defendant has not appeared in this court to support the judgment entered. We do not know the theory upon which the instruction to return a verdict for the defendant was given. The general rule is well settled, that if there is any evidence in the record from which, considered in the light most favorable to the plaintiff, a jury might, without acting unreasonably, find for the plaintiff, an instruction to find for the defendant is error. McGregor v. Reid, Murdoch & Co., 178 Ill. 464; Libby, McNeill & Libby v. Cook, 232 Ill. 206; Devine v. Delano, 272 Ill. 166; Kelly v. Chicago City Ry. Co., 283 Ill. 640.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

which are true.

The statement has not sufficient to this court to support the jury's verdict. It is not known the theory upon which the instruction is returned a verdict for the defendant was given. The general rule is well settled, that if there is any evidence in the record from which, considered in the light most favorable to the plaintiff, a jury might, without being unreasonably, find for the plaintiff, an instruction to find for the defendant is error. Kansas City, Mexico & Orient R. R. Co., 171 Ill. 444; Illinois Central R. R. Co. v. [illegible], 80 Ill. App. 1; Dunlap v. Peoples, 172 Ill. 188; Illinois Central R. R. Co., 200 Ill. 6[illegible].

For the foregoing reasons the judgment is reversed and the cause remanded.

Reversed and remanded.

Dibell, P. J., not concurring, J. J. Barton.

33400

E. K. GIBSON,
Appellee,

v.

HOSTELRY COMPANY OF KANKAKEE, a Corporation, et al.,
Appellants.

APPEAL FROM INTERLOCUTORY ORDER OF CIRCUIT COURT OF COOK COUNTY.

252 I.A. 654

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Chicago Trust Company as trustee, (one of several defendants) from an order entered whereby Milton H. Morris was "appointed receiver of the assets and property, real and personal, things in action, debts, equitable interests and other effects of the defendant, Hostelry Company of Kankakee, a corporation of Illinois." The order states that the receiver shall collect and marshall the properties, rents, issues, incomes and profits, and prosecute and defend suits in law or in equity involving the property or assets of the corporation, and authorizes the employment of counsel for that purpose. It further ordered that an injunction issue against the Chicago Trust Company, trustee, and others, enjoining and restraining them from disposing of, transferring or pledging certain securities of the Hostelry Company of Kankakee, "and each of them are further restrained and enjoined from instituting suits in law or in equity in the nature of foreclosure or other proceedings based upon the securities of the said Hostlery Company of Kankakee until the further order and direction of this court. And for good cause shown, it is further ordered that said injunction issue without notice and without bond."

The bill was filed on January 17, 1929, and the order appointing the receiver and directing that the injunction issue was entered the following day. The complainant is E. K. Gibson, who brings the bill in behalf of himself and other stockholders,

B. E. GRAHAM,
Appellee,

vs.

SECURITY COMPANY et al
HARRING, a corporation,
et al.,
Appellees.

MR. JUSTICE ALGERNON SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Illinois Trust Company as trustee, (one of several defendants) from an order entered October Million 2, nineteen "notwithstanding the verdict of the moving and [illegible] real and personal, owing to [illegible], [illegible], [illegible] and other effects of the defendant, security company of Chicago, a corporation of Illinois." The order states that the [illegible] shall collect and [illegible] the property, income, [illegible] and profits, and proceeds and [illegible] [illegible] involving the property or assets of the corporation, and [illegible] the employment of counsel for that purpose. It further ordered that on [illegible] the Chicago Trust Company, trustee, and others, [illegible] and [illegible] from [illegible] of, [illegible] or [illegible] [illegible] by the Security Company of Chicago, "and each of them [illegible] [illegible] and enjoined from [illegible] [illegible] in law or in equity in the nature of [illegible] or other proceedings based upon the [illegible] of the Security Company of Chicago with the [illegible] and direction of this court. And for good cause shown, it is further ordered that said injunction [illegible] [illegible] [illegible]."

The bill was filed on January 17, 1917, and its order appointing the receiver and [illegible] [illegible] [illegible] entered the following day. The [illegible] is [illegible], the trust the bill is [illegible] [illegible] [illegible].

creditors or parties in interest who may thereafter join.

The material facts as alleged in the bill are that the complainant is a stockholder of the defendant corporation, having purchased, at a date not named and for a price not disclosed, 65 shares of the preferred capital stock of the par value of $100 each, which, it is averred, are duly registered in his name. The corporation was organized in April, 1925, its charter recorded in Cook county, and its principal place of business stated to be at 29 South LaSalle street, Chicago. The total capital stock consists of 2,000 shares of preferred stock and 4,000 shares of common stock of no par value; 1113 shares of the preferred stock and 3860 shares of the common stock are outstanding, the remainder being held in the treasury. The bill says that the company was organized by Fred C. Bristol, a partner of one Cedric H. Smith, doing business under the name of Bristol & Company, engaged in the business of underwriting bond and stock issues; that this company was owned and controlled by Bristol; that he caused Claude R. Egan to become president and Cedric H. Smith secretary of the Hostelry Company; that these two are dummies of Bristol; that Bristol caused to be issued to himself the 3,860 shares of the common stock; that Egan and Smith have at all times carried out his will and orders; that on July 1, 1925, pursuant thereto, the company executed and delivered a trust deed conveying to the defendant Chicago Trust Company lands and buildings of the company to secure bonds in the aggregate amount of $350,000; that in May, 1926, Bristol also caused the officers and directors of the corporation to execute for it another mortgage in the nature of a junior trust deed, whereby its property was conveyed to the Calumet National Bank as trustee to secure an issue of about $200,000 of second mortgage 7% bonds; that Bristol manipulated, traded, controlled and otherwise dealt in said securities as if they were his own individual property; that he distributed them to

creditors or parties in interest who may intervene [illegible].

The material facts as alleged in the bill are that the complainant is a stockholder of the defendant corporation, having purchased, at a date not named but long prior to [illegible], 85 shares of the preferred capital stock of the par value of $100 each, which, it is averred, are duly registered in his name. The corporation was organized in April, 1925, its charter recorded in Cook County, and its principal place of business stated to be at [illegible] South LaSalle Street, Chicago. Its total capital stock consists of 2,000 shares of preferred stock and 5,000 shares of common stock of no par value; 1,112 shares of the preferred stock and [illegible] shares of the common stock are outstanding, the remainder being held in the treasury. The bill says that the company was organized by Percy [illegible] Bristol, a partner of one Cedric B. Smith, doing business under the name of Bristol & Company, engaged in the business of underwriting bond and stock issues; that this company was owned and controlled by Bristol; that he caused Claude A. Ryan to become president and Cedric B. Smith secretary of the defendant company; that these two are dummies of Bristol; that Bristol caused to be issued to himself the 3,800 shares of the common stock; that Ryan and Smith have at all times carried out his will and orders; that on July 1, 1925, pursuant thereto, the company executed and delivered a trust deed conveying to the defendant Chicago Trust Company lands and buildings of the company to secure bonds in the aggregate amount of $225,000; that in May, 1929, Bristol [illegible] the officers and directors of the corporation to execute for it another mortgage to the [illegible] of [illegible] Trust Bank, whereby its property was conveyed to the Columbia National Bank as trustee to secure an issue of bonds $225,000 of income mortgage 7% bonds; that Bristol manipulated, [illegible], controlled and otherwise dealt in such securities as if they were his own individual property; that he distributed them to

various persons, the majority of whom are not innocent holders for value; that some of the bonds were traded for real estate, to which Bristol and Bristol & Company retained title and which they have encumbered for their own benefit and advantage; that many of the bonds were also pledged by Bristol for his own uses and purposes and that Bristol and Bristol & Company, under the guise of commissions, appropriated first and second mortgage bonds in an amount in excess of $225,000; that many of these outstanding bonds are held by numerous persons who were put upon inquiry as to the legality and good faith of the transfer and ownership thereof, but that complainant is not able to state the facts and circumstances with certainty; "still it would appear," the bill avers, that the Hostelry Company received only about $240,000 out of the $350,000 issue of bonds; that through certain agreements two Surety companies, which are made defendants, guaranteed the payment of a portion of the first mortgage bonds, and that certain moneys, bonds and other property, "the exact nature of which your orator is not informed," were assigned and turned over to these companies; that Bristol and Bristol & Company have diverted moneys of the company to the London & Lancashire Indemnity Company and the Federal Surety Company, which they now hold and threaten to appropriate to their own use; that large blocks of the bonds were used for objects of a personal nature; that about $85,000 of the junior bonds were turned over to one John Carnegie without consideration; that Carnegie delivered these bonds to one Bigley in exchange for a piece of land; that Bristol and Bristol & Company were indebted to the Chicago Trust Company and were its customers and depositors; that the Trust Company knew that the Hostelry Company was controlled and dominated by Bristol and Bristol & Company and that Smith was a partner of Bristol; that nevertheless, in August, 1928, it entered into an agreement with Bristol and Bristol & Company whereby it secured

various persons, the majority of whom are not investment bankers par-
ticipating; that some of the bonds were issued for legal services, to Mr.
Bristol and Bristol & Company related title and other legal matters
encountered for their own benefit and advantage; that some of the
bonds were also placed by Bristol for his own use and purposes
and that Bristol and Bristol & Company, under the guise of com-
missions, appropriated (inter alia) approximately [illegible] to [illegible]
in excess of $[illegible]; that many of these commission checks are
held by numerous persons who were not even inquiry as to the [illegible]
quality and good faith of the transfer and ownership thereof, but
that consideration is not held to which [illegible]
with certainty; "still it would appear," the [illegible], that the
Hosiery Company received only about [illegible] of the [illegible]
issue of bonds; that through certain [illegible] the [illegible]
payment, which are mere date-checks, constituted the payment of a
portion of the final purchase price, and that certain [illegible]
and other property, "the exact extent of which your [illegible] is not
informed," were omitted and carried over by [illegible]; that
Bristol and Bristol & Company have diverted assets of the Hosiery
to the benefit of the Hosiery Company and the Federal Hosiery
Company, which has not been [illegible] to [illegible] to
own and that large issues of the bonds were used for payment of a
personal nature; that about $[illegible] of the [illegible] were [illegible]
over to one John Cerniglia without consideration; that Cerniglia de-
livered these bonds to one [illegible] in exchange for a [illegible] [illegible];
that Bristol and Bristol & Company were interested in the Hosiery
Trust Company and were its depositors and creditors; that the Trust
Company knew that the Hosiery Company was [illegible] and controlled
by Bristol and Bristol & Company and that [illegible] was a nominee of
Bristol; that [illegible], in August, 1929, [illegible] [illegible] of
agreement with Bristol and Bristol & Company whereby it assumed

the conveyance to it by John Carnegie of the land theretofore conveyed to him for the purpose of securing the obligations of Bristol and Bristol & Company; that Bristol delivered to the Trust Company approximately $43,000 worth of junior mortgage bonds as additional security for the indebtedness of himself and Bristol & Company to the Trust Company, and that the Trust Company had full knowledge that the bonds were the property of the Hostelry Company; that the Hostelry Company received no consideration for the bonds; that Marcus Aurelius has $8,000 of these junior mortgage bonds, which he holds for Bristol and Bristol & Company; that in September, 1928, Bristol delivered to Harry L. Topping of Kankakee junior mortgage bonds of the sum of $5,000, in consideration of which Topping delivered to Bristol preferred stock of the Hostelry Company in a like amount; that Topping had knowledge that Bristol or Bristol & Company had no title to the bonds and of the other facts; that Bristol delivered to one James H. Moffatt $6,500 junior mortgage bonds for a personal indebtedness; that Moffatt received the bonds with such knowledge; that in this manner Bristol has disposed of $150,000 of the junior mortgage bonds to persons who are charged with such knowledge; that Bristol and Bristol & Company have made no accounting, although complainant has demanded that he do so; that the Hostelry Company owns certain described lands in Kankakee worth at least $100,000, a hotel building located thereon of the value of $500,000, furniture, fixtures, equipment, etc., of the value of $100,000; that its total liabilities, exclusive of the two mortgages, will not exceed $75,000, and that the corporation is amply solvent.

It is averred that on October 1, 1928, the corporation "entirely ceased to do business, closed its doors and discharged all of its employees," and that since that date it has in no way functioned nor has it in any manner exercised its corporate

the conveyance to it by [illegible] of the last [illegible] con-
veyed to him for the purpose of securing the obligations of Bristol
and Bristol & Company; that Bristol delivered to the Trust Com-
pany approximately $42,700 worth of junior mortgage bonds as addi-
tional security for the indebtedness of himself and Bristol & Com-
pany to the Trust Company, and that the Trust Company had full
knowledge that the bonds were the property of the Hotel Company,
that the Hotel Company received no consideration for the bonds;
that Marcus [illegible] has $5,000 of junior mortgage bonds,
which he holds for Bristol and Bristol & Company; that in September,
1928, Bristol delivered to Harry L. [illegible] of [illegible] junior mort-
gage bonds of the sum of $5,000, in consideration of which [illegible]
delivered to Bristol preferred stock of the [illegible] Company in a
like amount; that [illegible] had [illegible] that [illegible] of Bristol &
Company had no title to the bonds and [illegible] other party; that
Bristol delivered to [illegible] James [illegible] $[illegible] junior mortgage
bonds for a personal indebtedness; [illegible]
bonds with such knowledge; that [illegible] has
disposed of $100,000 of the junior mortgage bonds to persons who
are charged with such knowledge; that Bristol and Bristol & Com-
pany have made no accounting, although [illegible] has demanded
that he do so; that the [illegible] Company [illegible]
lands in Arkansas worth at least $[illegible], a hotel building [illegible]
thereon of the value of $[illegible], furniture, fixtures, equipment,
etc., of the value of $[illegible], and its total liabilities, ex-
clusive of the two mortgages, [illegible] $[illegible], and that
the corporation is amply solvent.

It is averred that on October 1, 1929, the corpora-
tion "entirely ceased to do business, closed its doors and dis-
charged all of its employees," and that since that date it has in
no way functioned nor has it in any manner exercised its corporate

powers; that Egan and Smith have resigned and declined to have further connections with the corporation and its officers; that no successors have been elected; that a judgment was entered in the Circuit court of Cook county against the Hostelry Company in a sum in excess of $30,000; that execution has issued thereon, the sheriff has made demand and the execution has been returned "No property found," and the judgment is wholly unsatisfied; that in 1926 the Hostelry Company entered into a contract with the Great Lakes Hotel Company, an operating corporation, whereby it was agreed that said Great Lakes Company would manage and operate the hotel, lease the stores contained in the hotel building and from the proceeds, after deducting expenses, pay the net income to the Hostelry Company as rent; that the contract may be cancelled upon 30 days notice; that by reason of the Hostelry Company having closed its offices, etc., there is no way to receive the rent or make proper disbursement thereof; that a large number of bondholders and creditors have placed their claims in the hands of attorneys and are insisting that unless immediate payment is made, suit will be instituted and liens and attachments fastened on the property of the Hostelry Company; that certain creditors have already instituted suit, so that the assets are in great danger of being dissipated and wasted by reason of default judgments and attachments; that the hotel property and stores are earning over and above all expenses the sum of $35,000 per annum, available for its secured and unsecured creditors; that the stores have been rented to good and responsible tenants; that the hotel itself has been rented at a substantial profit and that its future, if properly operated, is assured.

It is averred that unless the court takes jurisdiction there will be a multiplicity of suits and a race of diligence, attempts will be made to secure judgments and priorities, attachments and levies will be made upon the property and the Great Lakes

Company will be prevented from operating the hotel to the great loss and detriment of complainant and other creditors.

It is contended by defendant Trust Company that the court erred both in the appointment of a receiver and the direction that an injunction issue.

Cases are cited in which complainants prayed and secured the appointment of receivers to the end that corporations might be wound up and the assets distributed, and in which our Supreme court held the trial court was without jurisdiction to so decree at the suit of a stockholder in the absence of a statute authorizing such relief. People v. Weibley, 155 Ill. 421; Coquard v. Nat'l Linseed Oil Co., 171 Ill. 480; Blanchard Bro. & Lane v. Gay Co., 239 Ill. 413, and Goldman v. Mackey, 288 Fed. 389.

The bill here does not pray for the dissolution of the corporation, and this case is therefore clearly distinguishable from the cases cited.

In Schmidt v. Johnson, 166 Ill. App. 6[illegible], this court affirmed an order appointing a receiver pendente lite after the suit of complainants, who were holders of about one-third of the stock of the corporation, the court stating:

> "In exhaustive examination of reported cases of a similar character, in which receivers have been appointed, we have been unable to find any wherein the facts seemed to warrant more clearly the interposition of a court of equity than the one now under consideration."

In that case the court quoted with approval Morawetz on Private Corporations, 2nd ed., sec. 281, as follows:

> "The appointment of a receiver or manager of a solvent corporation must therefore be considered a strong remedy, which can be justified only in a strong case; and the management of the corporation should be restored to its shareholders as soon as this can be done with safety."

See also Fetherstone v. Cooke, L. R. 16 Eq. 298; Chandler Mortgage Company v. Loring, 113 Ill. App. 423; Merrifield v. Burrows, 153 Ill. App. 523; Pride v. Pride Lumber Co., 1109 Me. 452, 1915A--L.R.A.608, and 23 A. & E. Enc. of Law, 2nd ed., p. 1004.

Company will be prevented from [illegible] the [illegible] of the great loss and detriment of complainant and cross defendant.

It is contended by defendant [illegible] Company that the court erred both in the appointment of a receiver and the direction that an injunction issue.

Cases are cited in which [illegible] had procured the appointment of receivers to the end that corporations might be wound up and the assets distributed, and in those our Supreme court held the trial courts was without jurisdiction to so decree at the suit of a stockholder in the absence of a statute authorizing such relief. [illegible] v. [illegible], 1[illegible] Ill. 1[illegible]; Coquard v. Nat'l Linseed Oil Co., 171 Ill. 480; [illegible] v. [illegible] Car Co., 205 Ill. 425, and Williams v. [illegible], 200 Ill. [illegible].

The bill here does not pray for the dissolution of the corporation, and this case is therefore clearly distinguishable from the cases cited.

In [illegible] v. Johnson, 2[illegible] Ill. App. [illegible], this court affirmed an order appointing a receiver pendente lite upon the suit of complainants, who were holders of about one-third of the stock of the corporation, the court stating:

> "In successive examinations of reported cases of a similar character, in which receivers have been appointed, we have been unable to find any case in which the facts seemed to warrant more clearly the intervention of a court of equity than the one now under consideration."

In that case the court quoted with approval language in Fletcher Corporations, 2nd ed., sec. [illegible], as follows:

> "The appointment of a receiver or manager of a solvent going concern must therefore be considered a strong remedy, which can be justified only in a strong case; and the management of the corporation should be restored to its stockholders as soon as this can be done with safety."

See also Johnstone v. [illegible], [illegible]; [illegible] Company v. [illegible], 113 Ill. App. 225; [illegible] v. [illegible], 159 Ill. App. 552; Field v. [illegible], [illegible]; and 23 A. & E. Enc. of Law, 2nd ed., p. 1071.

In Skelers v. Meyer, 246 Ill. App. 18, this court stated the rule applicable in the granting of injunctions, and in McDougall Co. v. Woods, 247 Ill. App. 170, we discussed the jurisdiction of this court to review interlocutory orders appointing receivers. The authorities are there collected and reviewed. We stated:

> "The primary purpose of the statute permitting appeals from interlocutory orders is to permit a review of the exercise of the chancellor's discretion to determine whether the orders probably were necessary to sustain the status quo and preserve the equitable rights of the parties."

It is apparent that precedents are of little value in cases of this kind and that each case must be considered upon its own merits. After a careful perusal of the bill we are compelled in this case to hold that the appointment of the receiver and the issuance of the injunction were an abuse of discretion. The averments of fraud in the bill are general, indefinite and vague. The corporation is solvent, the complainant is the owner of a very small part of the stock, and the circumstances under which he acquired it are not stated. The bill does not disclose an emergency such as would require a receiver to protect the interest of the corporation, nor are any facts disclosed which would indicate an endeavor in good faith to bring the things of which complaint is made to the attention of the stockholders. The defendant who appeals is a trustee named in a trust deed. The injunction forbids this trustee to proceed by foreclosure to protect the interest of the holders of the securities.

The land conveyed by the trust deed is located in Kankakee county. The court of the county in which the land is situated is the proper one in which to bring a suit to foreclose. If such suit were brought complainant could intervene and secure an adjudication of his alleged rights.

The facts averred do not show an emergency which

justifies such drastic action without notice. The entry of these orders was an abuse of discretion, on account of which the same must be reversed.

REVERSED.

McSurely, J., concurs.

O'Connor, P. J., specially concurring: I concur in the result but not in all that is said in the opinion.

33177 2154 & 2167

ANDREW J. HIGHLAND and
WILLIAM H. DOHERTY,
Defendants in Error,

vs.

CLYDE A. BLAIR,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

252 I.A. 654

MR. PRESIDING JUSTICE GRIMES DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse an order of the Superior court entered May 5, 1928, wherein the court denied defendant's motion to set aside a judgment rendered by default against him on December 5, 1927, for $7,924.96. The motion is based upon the provisions of section 89 of the Practice act, - defendant claiming that an error in fact had intervened in the proceedings which resulted in the default and judgment.

Plaintiffs' action, commenced on July 20, 1927, with summons returnable to the September, 1927, term of the court, was in case for damages for fraud and deceit. Defendant was duly served on August 10, 1927, but he did not enter an appearance or file any pleading. Plaintiffs' declaration, consisting of one special count, was filed on August 26, 1927, - ten days before the commencement of said September term. The charge of fraud and deceit was in connection with plaintiffs' written agreement, executed in August, 1925, to purchase of defendant certain Florida land upon which plaintiffs had made payments from time to time in a large aggregate amount. On December 6, 1927, being in the December term, the court, on plaintiffs' motion, defaulted defendant for want of an appearance, heard evidence as to plaintiffs' damages, assessed them at $7,924.96, and entered judgment against defendant in said sum. On January 6, 1928, after the December term had passed, defendant appeared and filed a verified petition to set aside the judgment. Subsequently, on February 16, 1928, he filed an amended

[illegible]

ADAMS V. [illegible] and
[illegible] A. [illegible],
Defendants in Error,

vs.

[illegible] A. [illegible],
Plaintiff in Error.

Error to [illegible]

Mr. Justice [illegible] delivered the opinion of the court:

By this writ of error [illegible] seeks to reverse an order of the superior court entered May 2, 1927, [illegible] the motion of the defendant's motion to set aside a judgment rendered in the trial court entered [illegible] on December 2, 1927, [illegible]. The motion is based upon the [illegible] of the trial court, - defendant claiming that an error in [illegible] in the proceedings which resulted in the judgment [illegible].

Plaintiff's action, commenced on July [illegible], 1927, with summons returnable [illegible], 1927, and [illegible] in [illegible] for damages for [illegible]. Defendant was duly served on August [illegible], 1927, but [illegible] appearance or file any pleading. Plaintiff's [illegible], [illegible] of the special court, was filed on August [illegible], 1927, - [illegible] of said judgment. The motion [illegible] was in connection with [illegible] motion [illegible] in August, 1927, [illegible] of [illegible] which [illegible] was made [illegible] to [illegible] appropriate [illegible]. On December [illegible], [illegible] the court, on plaintiff's motion, [illegible] for want of appearance, [illegible] evidence [illegible] plaintiff's damages, [illegible] [illegible], and [illegible] [illegible] [illegible] sum. On January 9, 1928, [illegible] [illegible]. Defendant appeared [illegible] a [illegible] motion [illegible] judgment. [illegible], on December [illegible], [illegible] [illegible]

petition, also verified, to which plaintiffs filed an answer, verified by Edward H. S. Martin, one of their attorneys. Subsequently, defendant was given leave to file a so-called "counter affidavit," which was filed on May 4, 1928. It was stipulated by respective counsel that upon the final hearing of defendant's motion or petition the affidavit of said Martin in answer to defendant's amended petition should "receive the same consideration, relative to agreement with the facts and verity, as though said Martin was not an attorney in the case." The bill of exceptions discloses that upon the final hearing of defendant's motion the court considered defendant's verified petition and subsequent affidavit, plaintiffs' verified answer and the stipulation, and that no other evidence was heard.

It appears that after defendant was served with summons in the original cause in August, 1927, Martin, on behalf of plaintiffs, had various interviews with defendant as to a settlement; that defendant made several offers of settlement to Martin which upon submission by him to plaintiffs were rejected by them and defendant was immediately notified of said rejections; that before the end of November, 1927, defendant had knowledge that no settlement was probable; that he then knew that, although served with process, he had not appeared in the cause or set forth any defense and that because of this a default judgment might be entered against him at any time. It does not appear that either plaintiffs or Martin were guilty of any bad faith in taking said default judgment, or that defendant was "misled into suffering the default," as here contended by his counsel. On the contrary we think it clearly appears that the default judgment was the result of defendant's negligence. It is well settled that the provisions of section 89 of the Practice Act are "not intended to relieve a party from the consequences of his own negligence."

petition, also verified, to which plaintiffs filed an answer, verified by Edward S. S. Harris, one of their attorneys. Subsequently, defendant was given leave to file a document "further affidavit," which was filed on May 4, 1959. It was stipulated by respective counsel that upon the final hearing of defendant's motion or petition the affidavit of said Harris in support of defendant's amended petition should "reflect the same conversation, relative to agreement with the Court and counsel, as though said Harris was not an attorney in the case." The bill of exceptions discloses that upon the final hearing of defendant's motion the court considered defendant's verified petitions and subsequent affidavit, plaintiffs' verified answer and the stipulation, but that no other evidence was heard.

It appears that after defendant was served with summons in the original cause in January, 1957, Harris, an attorney of plaintiffs, had various interviews with defendant as to a settlement; that defendant made certain offers of settlement in person which upon submission by him to plaintiffs were rejected by them and defendant was immediately notified of such rejections; that before the end of November, 1957, defendant had the impression that no settlement was possible; that he [illegible], although served with process, he did not appear in the cause or file any defense and that because of this a default judgment would be entered against him at any time. It does not appear that plaintiffs or Harris ever agreed at any time that he would be held in default judgment, or that defendant was "misled into suffering the default," as here contended by his counsel. On the contrary we think it plainly appears that the default judgment was the result of defendant's negligence. It is well settled that the provisions of section 50 of the Practice Act are not designed to relieve a party from the consequences of his own negligence.

(Cramer v. Commercial Men's Ass'n,260,Ill.516; Loew v. Krauspe,320 id.244,250). While it is the law that "fraud on the part of the opposing party or his counsel that prevents one from making his defense is such an error of fact as can be availed of on writ of error coram nobis or under the statute" (People v Crooks,326.Ill.266,280, Chapman v.North American Ins.Co.292,id 179,189),we fail to find evidence of such fraud in the present transcript.

The order of the Court of May 5,1928 denying defendant's motion to set aside default judgment of December 5, 1927 should be affirmed and it is so ordered.

AFFIRMED

Scanlan and Barnes JJ., concur.

(Cramer v. Commercial Men's Ass'n,260,Ill.518;Loew v. Kramspe,320 Id.244,250). While it is the law that "fraud on the part of the opposing party or his counsel that prevents one from making his defense is such an error of fact as can be availed of on writ of error coram nobis or under the statute" (People v Crooks,328.Ill.268,280, Chapman v.North American Ins.Co.292,Id 179,189),we fail to find evidence of such fraud in the present transcript.

The order of the Court of May 5,1928 denying defendant's motion to set aside default judgment of December 5, 1927 should be affirmed and it is so ordered.

AFFIRMED

Scanlan and Barnes JJ., concur.

33186

In the matter of the estate of
JENS C. HANSEN, deceased,

MRS. O. L. STANGELAND, for use
of Mount Olive Cemetery
Association, a corporation,
Appellant,

v.

Estate of JENS C. HANSEN,
deceased, Johanna H. M. Hansen,
executrix,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

252 I.A. 654

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In May, 1928, in the probate court of Cook county, Mrs. O. L. Stangeland, "for use of Mount Olive Cemetery Association, a corporation, and on behalf of herself as a stockholder of said corporation," filed a verified claim or petition, hereinafter referred to. It is headed "Claim of Mount Olive Cemetery Association." The prayer is that the executrix of the estate and the Cemetery Association make answer thereto; that an accounting be had "of the dealings and transactions of Jens C. Hansen, deceased, by and with the funds, merchandise and property of the Cemetery Association;" that there be a full adjustment; and that any amount found to be due to the Association be allowed as a claim against the estate. After the Association had filed its answer the probate court, on July 12, 1928, expressly finding that it had no jurisdiction of the claim or petition, dismissed it. From this order Mrs. Stangeland appealed to the circuit court. On September 17, 1928, the executrix appeared in that court and moved that the claim or petition be dismissed. The motion was granted and the cause dismissed without

[illegible]

In the matter of the estate of
[illegible], deceased.

[illegible]

[illegible]. [illegible], [illegible] of [illegible]
of [illegible] "Live Democracy
Association, a corporation,
appellant,

v.

Estate of [illegible], deceased,
[illegible],
executrix,
appellee.

[illegible]

In May, 1929, in the probate court of [illegible], Mr. G. E. [illegible], "for use of [illegible] Association, a corporation, and on behalf of themselves as a [illegible] of said corporation," filed a verified claim or petition, [illegible] referred to. It is headed "Claim or [illegible] Democracy" The prayer is that the executrix of the estate and the Democracy Association make answer thereto; that an accounting be had "of the dealings and transactions of [illegible], deceased, by and with the funds, securities and property of the Democracy Association" that there be a full adjustment; and [illegible] decree to be due to the Association be claimed as a claim against the estate. After the Association had filed its answer the probate court, on July 18, 1929, erroneously ruling that it had no jurisdiction of the claim or petition, dismissed it. From this order Mr. [illegible] appealed to the circuit court. On September 17, 1929, the [illegible] appeared in that court and moved that the claim or petition be dismissed. The motion was granted and the cause dismissed without

costs, from which order of the circuit court Mrs. Stangeland prosecutes the present appeal.

The claim or petition is to the effect that the Cemetery Association is an Illinois corporation with capital stock of 8,000 shares of the par value of $25 each; that for more than 10 years Mrs. Stangeland has been and is now a stockholder, owning 1320 shares, and a director of the association; that during his lifetime and for about 16 years prior to his death (which occurred on April 27, 1927), Jens C. Hansen was a stockholder and director of the association and its secretary and treasurer; that after his death Mrs. Stangeland discovered that during his lifetime he "had embezzled and diverted" large sums of the association's money for his own use and for the use of others; that he knowingly permitted certain named persons to fraudulently convert to their own respective uses money and merchandise belonging to the association; that during the years 1920, 1923 and 1924 he received $2,002 of its funds with which to pay certain taxes and disbursed only $1,016 thereof and never accounted for the balance; that he paid personal debts of certain officers and employes of the association out of its funds; that altogether there is a "shortage" of $71,474.81 (as per itemized account); that Mrs. Stangeland, as a minority stockholder, has requested the officers and directors of the association to file in the probate court "the aforesaid claim of said association" against the estate, but that, although the time for filing it is about to expire, they have failed and refused to file it; that the association has not taken any other legal action to obtain an accounting from the estate for the funds so diverted by Hansen; and that unless petitioner is permitted to file this claim for and on behalf of the association, a large sum of money, which can only be realized out of Hansen's estate, will be lost to it, and she, as a stockholder, as well as other stockholders, will be irreparably damaged.

cause, from which order of the circuit court [illegible] jurisdiction the present appeal.

The claim or petition is to the effect that the [illegible] association is an Illinois corporation with capital stock of $[illegible] shares of the par value of $[illegible] each; [illegible] for more than 10 years [illegible] transacted business and is now [illegible] doing business, during 1[illegible], and a director of the association; [illegible] for which 16 years prior to his death [illegible] on April 27, 1[illegible], [illegible] C. Hanson was a stockholder and director of the association, and its secretary and treasurer; [illegible] all [illegible]. [illegible] alleged that having his liability as "[illegible]" [illegible] large sums of the association's money for its own use and for [illegible] use of others; that he knowingly permitted [illegible] to fraudulently convert to their own [illegible] money and [illegible] belonging to the association; that during the years [illegible], [illegible] 1924 he received $[illegible] of the funds [illegible] to his private [illegible] and disbursed only $1,[illegible] [illegible] the [illegible], that he paid personal debts at various [illegible] of the association; that at the time; that although [illegible] "[illegible]" of $[illegible] (the [illegible] [illegible]) [illegible] [illegible], [illegible] [illegible] [illegible] the association to file in the probate court "the statement claim of said association" against the estate; but that, although the time for filing it is about to expire, they have failed and refused to file it; that the association has not taken any other legal action to obtain an accounting from the estate for the funds in question; [illegible] that the [illegible] participant in [illegible] the act or benefit of the association, a large sum of money, which [illegible] realized out of Hanson's estate, will be lost to it, and the, as a [illegible], [illegible] [illegible], will be irreparably damaged.

In the association's answer it denied all allegations of embezzlement or unlawful conversion of its moneys by Hansen. While admitting that he received from the association the said sum of $2,002 and that taxes were paid by him therefrom to the amount of $1,016, it alleged that the difference "was used and consumed by Hansen in a litigation brought against it for the taxes for said years 1920, 1923 and 1924." It denied that Hansen at the time of his death owed any moneys to it. It alleged that an auditor employed by petitioner was given free access to all books and papers of the association; that said auditor claimed that he found certain inaccuracies and discrepancies in Hansen's accounts; that an auditor employed by the association found no such inaccuracies or discrepancies and so reported; that thereafter, at petitioner's request, a committee (of which petitioner was one) of the board of directors of the association was appointed to examine the books and Hansen's accounts; that the committee made a thorough examination with the aid of an independent public accountant; and that upon the examination "neither said committee nor said accountant was able to find anything in said books or accounts that would justify the filing of a claim against said estate, and so reported to the board of directors, which report was approved by the board." It is further alleged (admitted to be facts in the briefs of counsel here filed) that on May 24, 1928, petitioner filed in the superior court of Cook county a bill in chancery against the association, all of its directors (except petitioner), and said Johanna H. M. Hansen, executrix, etc., wherein petitioner made substantially the same claims as made herein and asked for the appointment of a receiver for the association and for other relief, and that said suit it still pending and undisposed of.

We are of the opinion that, under the allegations of the claim or petition and of the association's answer thereto, the probate

In the association's answer it denied all allegations of embezzlement or improperly conversion of its monies by Tremont. While admitting that he received from the association the sum of $[illegible] and that checks were paid by him therefrom to the amount of $[illegible], it alleged that the difference [illegible] by Tremont in a litigation brought against it for the same [illegible] and 1944. It denied that Warren as the agent of his wife, ever received money in it. It alleged that as another employee or participant was given free access to all books and papers of the association, which said auditor claims that he found certain irregularities and disappearances in Warren's accounts. Shortly before the employed by the association found no such irregularities or disappearances and so reported, that thereafter, at petitioner's request, a committee (of which petitioner was one) of the board of directors of the association was appointed to examine the books and Warren's accounts; that the committee made a thorough examination with the aid of an independent public accountant; and that upon the examination Tremont and associates her said accountant was duly so find nothing in writing to show or suggests that would justify the filing of a claim against real estate, and so reported to the board of directors, which thereupon approved by the board. It is further alleged (and) [illegible] in the state of counsel here (filed) [illegible] filed in the superior court of [illegible] the association, all of the directors [illegible] Johanna B. K. Ramsay, executrix, [illegible] substantially the same claims as made herein and [illegible] for the association and for other relief, and that such suit is still pending and undisposed of.

We are of the opinion that, under the allegations of the claim of petition and of the association's answer herein, the probate

court was without jurisdiction of the subject matter, and that the circuit court on appeal did not err in dismissing the cause. It does not appear that the association has any claim, either legal or equitable, against the estate which it desires to prosecute; neither does it appear that Mrs. Stangeland, individually, has any claim. She, as a stockholder of the association, filed the claim or petition in her own name for its use, stating that it has failed and refused to file any claim. She made the association a party to the petition and demanded that it make answer. In 1 Jones & Cunningham's Practice, Sec. 11, p. 9, it is said: "Where claims against estates are purely of an equitable nature this (probate) court is not ousted of its jurisdiction thereby, but may proceed to adjudicate thereon as if they were of a legal nature, but where third persons are to be brought in and conflicting interests are to be composed and settled this court may not act." See, also, Horner's Probate Practice, 3rd Ed., Sec. 96, p. 207; Pahlman, ex'r, v. Graves, 26 Ill. 405, 408; Marshall v. Marshall, 11 Colo. App. 505, 510. In the Pahlman case, it is said: "The county court has no jurisdiction to entertain such a bill on such a case. What this court said in Rodgers v. Moon, 19 Ill. 349, and in Dixon v. Buell, Adm'r, 21 id. 204, was not intended to assert the doctrine contended for by appellee, that the county court has a general equitable jurisdiction in cases where third parties are required to be brought in, and conflicting interests composed and settled." In Hannah v. Meinshausen, 295 Ill. 525, 527, it is said: "Probate courts are not courts of general chancery jurisdiction. The jurisdiction of such courts is fixed by section 6 of the constitution and the acts of the legislature passed in pursuance thereof. The constitution provides that said courts, when established, shall have original jurisdiction in all probate matters, - the settlement

of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, etc. The act of 1877 providing for the establishment of probate courts conferred jurisdiction on those courts in the language of the constitution, and it has been held that while the probate courts may, within the limits of the jurisdiction conferred, exercise chancery powers, they are not given general chancery powers and are not courts of general equity jurisdiction." Furthermore, we do not think that in the probate court Mrs. Stangeland, as a stockholder of the association, could properly prosecute a claim of the association which she thinks it has against the estate. In 6 Fletcher's Cyc. Corp., sec. 4052, p. 6868, it is said: "Neither a single stockholder nor all the stockholders, as individuals, can maintain an action at law in their own names upon a contract made by the corporation, or for injuries committed against the property of the corporation, as trespass, trover for the conversion of property, etc. All such actions must be brought in the corporate name, and cannot be maintained by stockholders in their own names, either on their own behalf because of their equitable interest in the property of the corporation, or on behalf of the corporation. * * It makes no difference in the application of this rule that the injury is caused by the officers of the corporation in their management of its affairs. Misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, is an injury to the corporation, for which it must sue."

The judgment of the circuit court, appealed from, is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts, etc. The act of 1877 providing for the establishment of probate courts conferred jurisdiction on those courts in the language of the constitution, and it has been held that while the probate courts may, within the limits of the jurisdiction conferred, exercise chancery powers, they are not given general chancery powers and can not invoke of general equity jurisdiction." Accordingly, we do not think that in the probate court Mrs. Sargeland, as a stockholder of the association, could properly prosecute a claim of her association against the trustee in the manner in which it was done. In 2 Fletcher's Cyc. Corp., sec. 1124, p. 4848, it is said: "Neither a single stockholder nor all the stockholders, as individuals, can maintain an action in their own name upon a contract made by the corporation, or for injuries committed against the property of the corporation, or trespasses, waste in the conversion of property, etc. All such actions must be brought in the corporate name, and cannot be maintained by stockholders in their own names, either on their own behalf because of their individual interest in the property of the corporation, or on behalf of the corporation. * * It makes no difference in the application of this rule that the injury is caused by the officers of the corporation in their management of its affairs. Misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, is an injury to the corporation, for which it must sue."

The judgment of the circuit court, appealed from, is affirmed.

Cranian and Barnes, JJ., concur.

33381

2587

HARRY J. FIREMAN,
Appellee,
v.
OLIVER F. SMITH,
Appellant.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

252 I.A. 655

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order or decree, entered by the superior court on December 11, 1928, appointing the Union Bank of Chicago as receiver for the assets of Oliver F. Smith. No briefs have here been filed by appellee.

On November 28, 1921, Smith executed and delivered a collateral, judgment note for $30,000, payable to the order of State Bank of Chicago. The mentioned collateral was 200 shares of the Citizens Trust & Savings Bank of Chicago, and it was provided that 10 per cent of any indebtedness due might be included as attorney's fees in any judgment confessed. Subsequently the payee (State Bank) endorsed it without recourse and delivered it to William Hughes. It bore the endorsements of five individuals who were directors of the Citizens Bank. Subsequently Hughes received from Smith two payments, aggregating $4,000, which were applied on the note. On February 27, 1925, Hughes caused a judgment by confession for $32,403.60, to be entered upon it against Smith in the municipal court of Chicago. This amount was made up of principal, $26,000, interest, $3803.60, and attorney's fees, $2,600. Execution was issued and returned unsatisfied. On June 2, 1927, there was filed an assignment of the judgment from Hughes

to the complainant, Fireman.

On October 1, 1928, complainant filed the present creditor's bill against Smith and others, praying for the appointment of a receiver for Smith's assets, a discovery and other relief. Complainant alleged in substance that Smith was the equitable owner of certain properties which he had transferred to others for the purpose of hindering his creditors. The purport of Smith's sworn answer was that since the delivery of the note and the entry of the confessed judgment, by reason of certain business transactions had between Hughes and Smith, the note and judgment had been paid. He further alleged that complainant was not a bona fide assignee of the note. Smith also filed a cross bill, praying that the court enter an order that the judgment be satisfied. Complainant demurred to the cross bill.

On October 29, 1928, complainant having moved for an appointment of a receiver pendente lite, the court ordered that the motion "be held in abeyance pending a hearing on defendant's offer to prove that the judgment had been paid sometime between February 27, 1925 (the date of its entry) and June 2, 1927 (the date of its assignment)," and that the cause be referred to a master to hear evidence and report on the sole question, "Was said judgment paid by defendant to William Hughes sometime between February 27, 1925, and June 2, 1927?" Smith deposited $300 with the clerk to insure payment of the costs of the reference, and a hearing was had before the master at which both Smith and Hughes as well as other witnesses testified, and considerable written evidence was introduced. Subsequently the master filed a report in which, after making numerous findings, he concluded that "said judgment has not been paid."

On December 11, 1928, the court entered two orders, in the first of which, after reciting that the master's report had been

to the complainant, Plumam.

On October 1, 1924, complainant filed the present Smith's bill against Smith and others, praying for the appointment of a receiver for Smith's assets, a discovery and other relief. Complainant alleged in substance that Smith was the equitable owner of certain properties which he had transferred to others for the purpose of hindering his creditors. The purport of Smith's sworn answer was that minus the validity of the note and the entry of the confessed judgment, by reason of certain business transactions had between Hughes and Smith, the note and judgment was void. In further answer Smith denied that complainant was not a bona fide creditor of the same. Smith also filed a cross bill, praying that a receiver enter an order that the judgment be satisfied. Complainant demurred to the cross bill.

On October 24, 1924, complainant having moved for an appointment of a rule for contempt against Smith, the court ordered that the motion "be held in abeyance pending a hearing on defendant's offer to prove that the judgment had been held nonexistent between February 27, 1923 (the date of its entry) and June 2, 1927 (the date of the marriage)," and that the cause be referred to a master to hear evidence and report on the rule accordingly. The said judgment was by defendant in William Hughes counsel between February 27, 1923, and June 2, 1927" with disposition also with the clerk to insure payment of the costs of the reference, and a hearing on, and to the master at which both Smith and Hughes as well as other witnesses testified, and counsel made written evidence the introduction. Subsequently the master filed a report in which, after making numerous findings, he concluded that "the judgment has not been paid."

In December 11, 1926, the court entered two decrees, in the first of which, after recitals that the master's report had been

read and arguments of respective counsel heard, it was ordered that the "Union Bank of Chicago be and it is hereby appointed receiver herein, for all of the assets of Oliver F. Smith, wheresoever situated, with the usual powers of receivers in chancery in like cases, and * * that for good cause shown the bond of the complainant be and the same is hereby waived and excused."

In the second order, entitled an "interlocutory decree," the court made numerous findings, following those of the master, substantially as follows: Smith was a banker and in 1905 organized the Citizens' Trust and Savings Bank and became its president. Smith and Hughes had had various financial dealings with each other. On December 23, 1921, Smith came to Hughes' home and said that it was necessary for him to have $80,000 because he was in financial trouble. Hughes agreed to assist Smith, telling him that he (Hughes) had $10,000 in cash. Smith suggested that Hughes could procure a loan from the State Bank of Chicago. On the following day they met Maurice Berkson, an attorney. At that meeting Smith agreed to turn over to Hughes, as security for a $80,000 loan, his note guaranteed by the directors of said Citizens' Bank for $30,000, also 301 shares of the stock of said bank and a 2nd mortgage bond of $40,500 on the Spencer Building in Chicago, and further agreed to pay back the loan to Hughes within a year. Thereupon Smith, Hughes and Berkson interviewed an official of the State Bank with the result that the bank decided to and did loan $80,000, receiving at the time from Hughes his check for $10,000 and his note for $70,000, and collateral security as follows: 2nd mortgages on two buildings, and the $40,500 Spencer Building bond. The bank turned over to Berkson "several notes which it held as security for Smith's loan" - one of them being "a note for $30,000, dated November 28, 1921," another for $20,000, dated July 2, 1921, and another for $25,000, dated September 6, 1921,

road and arguments of respective counsel heard, it was ordered that the "Union Bank of Chicago" be and it is hereby appointed receiver herein, for all of the assets of Citizens' Bank, wherever situated, with the usual powers of receivers in chancery in like cases, and * * that for good cause shown the bond of the complainant be and the same is hereby waived and excused."

In the second order, entitled an "interlocutory decree," the court made numerous findings, including some of the matters, substantially as follows: Smith was a banker and he had organized the Citizens' Trust and Savings Bank and became its president. Smith and Hughes had had various financial dealings with each other. On December 23, 1932, Smith came to Hughes' home and told him it was necessary for him to have $50,000 because he was in financial trouble. Hughes agreed to assist Smith, telling him that he (Hughes) had $10,000 in cash. Smith suggested that Hughes could procure a loan from the State Bank of Chicago. On the following day they saw Maurice Jackson, an attorney. At that meeting Smith agreed to turn over to Hughes, as security for a $50,000 loan, his note guaranteed by the directors of said Citizens' Bank for $50,000, also 200 shares of the stock of said bank and a 2nd mortgage bond of $15,000 on the Spencer Building in Chicago, and further agreed to pay back the loan to Hughes within a year. Thereupon Smith, Hughes and Jackson interviewed an officer of the State Bank with the result that the bank decided to and did loan $50,000, receiving at the time from Hughes his check for $10,000 and his note for $40,000, and collateral security as follows: 2nd mortgages on two buildings, and the $15,000 Spencer Building bond. The bank turned over to Jackson "several notes which it held as security for Smith's loan – one of them being "a note for $50,000, dated November 20, 1932," another for $10,000, dated July 2, 1932, and another for $25,000, dated September 1, 1932,

but the stock of the Citizens' Bank was not turned over to Hughes, and the only collateral received by him was said $40,500 Spencer Building bond and said $30,000 note. Hughes was compelled to pay at its maturity said $70,000 note. In June, 1922, Smith told Hughes he needed $10,000, that he had $12,000 worth of Motor Building bonds and that he would turn over these bonds to Hughes if he (Hughes) would give him $10,000 "in addition to what he had already advanced him." Thereupon Hughes gave to Smith his check for $10,000 and received from Smith $12,000 worth of said Motor Building bonds.

The court further found in substance that in November, 1922, Smith stated to Hughes that he "could not pay to him the $80,000 that he owed him," and further stated that "he desired to settle the matter, that he would give to him (Hughes) the Spencer Building bond of $40,500, and also the equity in a building located at 91st street and Escanaba avenue valued at $25,000," on which there was a mortgage of $41,000. About this time Smith and Hughes showed Berkson a written statement of their various transactions concerning the $80,000 loan and Hughes stated "that he had settled his matters with Smith as well as he could under the circumstances; that he was to have the property at 91st street and Escanaba avenue, and the Motor Building bonds and the Spencer Building bond; * * and that he was to retain the $30,000 note, endorsed by the directors and on which $4,000 had been paid." At this interview both Smith and Hughes informed Berkson that "they had agreed on all of the items and that the balance due to Hughes, after the adjustment of the various debits and credits, was $19,008.57, for which a new note was to be signed by Smith and endorsed by the directors of said Citizens Bank." A note for $19,008.57 was drafted by Berkson and given to Smith, who was to procure the necessary signatures thereon, and there

but the stock of the Citizens' Bank was not owned wholly by Smith; and the only collateral [illegible] was a [illegible] of Smith's Building bond and [illegible] note. [illegible] was [illegible] to pay at its maturity said $70,000 note. In fact, [illegible], this said note should be worth $20,000, that is the $10,000 worth of motor building bonds, and that it would turn over these bonds to the bank if he (Hughes) would give the $10,000 in addition to what he had already advanced him." Thereupon Hughes gave to Smith his check for $10,000 and received from Smith $10,000 worth of motor building bonds.

The court further found in relation to that in November, 1922, Smith wrote to Hughes that he "could not pay in the [illegible] $80,000 that he owed him," and further stated that the matter is getting the matter, that he would give to him [illegible] the Greater Building bond of $40,000, and also the [illegible] in a [illegible] at that across and increase [illegible] value of $20,000, or which there was a mortgage of $41,000. About this time Smith and Hughes signed Hughes a written statement of their various transactions concerning the $80,000 loan and Hughes stated that he had [illegible] his matters with Smith as well as he could under the circumstances; that he was to have the property at 5th street and [illegible], and the Motor Building bonds and the Greater Building bond; [illegible] and that he was to retain the $40,000 note, secured by the mortgage on which $4,000 had been paid." It this interview with Smith and Hughes informed Jackson that "they had agreed on all of the items and that the balance due to Hughes, after the adjustment of the various debts and credits, was $18,000.00", for which a new note was to be signed by Smith and endorsed by the directors of said Citizens Bank." A note for $18,000.00 was drafted by Jackson and given to Smith, who was to procure the necessary signatures thereon, and there

was discussion concerning the 91st street property. Berkson inquired whether it was necessary to draw any conveyances or documents in connection therewith, and suggested that if Hughes already had title thereto it might be well for him to re-convey to Smith and have Smith execute another deed to Hughes. Berkson prepared the deeds and gave them to Hughes, but Smith subsequently told him (Berkson) that they "had been torn up," and for the reason that "Hughes already had title and it was unnecessary to make other conveyances."

The said written statement, bearing date December 1, 1922, was introduced in evidence and is also set out by the court in said order. There was an error in the wording of the decree as to one item of the statement, which was rectified by a court order, entered January 8, 1929. In the statement are eight items, aggregating $92,214.82, showing this sum to be Smith's total indebtedness to Hughes. As against this sum are seven items of credits, aggregating $73,206.25, and showing a balance due to Hughes of $19,008.57, which is preceded by the words "Director's Note." Four of the seven credit items are for interest received on the Spencer bond and the Motor bonds and the three other credit items are as follows:

"Spencer Bond	$36,500
Motor Bonds	10,000
Equity 91st St. Bldg.	25,000"

The court in said order then stated the <u>contentions</u> of Smith, viz, that the 91st street property was held by Hughes simply as collateral security for Smith's indebtedness; that the title to the property was conveyed to Hughes by Marshall Smith, a brother of defendant Smith, by deed dated June 10, 1920, recorded June 17, 1920; that Hughes about the same time gave to defendant Smith a deed conveying the property, but that said deed was torn up by Smith sometime

was discussion concerning the Flat street property. Barkson inquired whether it was necessary to have the conveyance or mortgage in connection therewith, and suggested that if Hughes attorney had title thereto it might be well for him to convey to Smith and have Smith execute another deed to Hughes. Barkson produced the deeds and gave them to Hughes, but Smith nevertheless told his (Barkson) that they "had been torn up" and for the reason that "Hughes already had title and it was unnecessary to make other conveyances."

The said written statement, bearing date December 1, 1924, was introduced in evidence and is also set out by the court in said order. There was an error in the writing of the contract in one item of the statement, which was rectified by a court order, entered January 8, 1926. In the statement the total item, representing $22,214.82, showing this sum to be Smith's total investment in Hughes. It appears this sum was across items of mortgage, amounting $75,000.00, and showing a balance due to Smith of $14,000.00, which is preceded by the words "Director's Note." Four of the seven credit items are for interest received on the Quarter Road and the other three other credit items are as follows:

"Quarter Road	$28,000
Rutter Lumber	37,000
Holly Hill Co. Note	8,000"

The court in said order then stated the conclusions of Smith, viz., that the Flat street property was held by Hughes simply as collateral security for Smith's investment; that the title to the property was conveyed to Hughes by Mortimer Smith, a brother of defendant Smith, by deed dated June 10, 1924, recorded June 17, 1924; that Hughes about the same time gave to Mortimer Smith a deed conveying the property, but that said deed was torn up by Smith sometime

between December, 1921, and January 10, 1922; and that Hughes had collected sufficient moneys from rents from the property to pay the entire amount of the judgment in question. The court, however, found that Hughes did not execute any deed conveying the property to Smith prior to the month of December, 1922, when such deed was prepared by Berkson for Hughes' signature; that a deed was to be signed by Hughes and wife reconveying the property to Smith, and another deed reconveying the property by Smith to Hughes was prepared for the signature of Smith and wife; and that said deeds were afterwards destroyed by Smith, who stated that it was not necessary to reconvey the property as the title thereto was already vested in Hughes.

And the court further found that statements of collections of rents and expenditures, made by Hughes, were submitted to Smith up to and including November 30, 1922; that on said date the balance due to Hughes, regarding said rents and expenditures, amounted to $2,311.90, and that said balance appeared in said written statement of December 1, 1922, and was agreed to be correct; that since November 30, 1922, no further statements as to said rents and expenditures were rendered by Hughes and none was ever required by Smith; and that the mortgage indebtedness on the property became due in 1926 and was renewed by Hughes. The court then adjudged that under the terms of the agreement between the parties, made about December 1, 1922, "the equity in said property was taken by Hughes at a valuation of $25,000, and that Smith is not entitled to any rents therefrom since November 30, 1922;" and that the judgment in question has not been paid by Smith either to Hughes or to Firoman (complainant).

The court then ordered and adjudged that Smith's exceptions to the master's report be overruled, that the report be approved and confirmed, that the costs of the reference (amounting to $174.25)

between December, 1961, and January 1st, 1962, the trustees had collected additional money from rents from the property to pay the entire amount of the judgment in question. In money, however, issued that Hughes did not execute any deed conveying the property to Smith prior to the sending of December 1st, when such deed was prepared by Jackson, the Hughes' attorney; that a deed was to be signed by Hughes and this witnesses, the property be sold, and another deed reconveying the property to Smith to Hughes was prepared for the signature of Smith and that such deeds were effectively delivered to Smith, and that it was not necessary to recovery the property on the title because was already vested in Hughes.

At the court's further found that evidence of notification of rights was unquestionably mail to Hughes, was sufficient to put up to and including December 1st, 1961; that at no time have the heirs and to the best knowledge, will trade and representative, Jennette Hughes, and that, said heirs agreed to sell within timeout of December 1st, 1961, and was agreed by the attorneys that about December 1st, 1961, no further determination to be said issue and no predictions were rendered by Hughes and judge was stopping by Smith and that the mortgage indebtedness on the property known the 1st and was renewed by Hughes. The court then stipulated that under terms of the agreement between the parties, made about December 1, 1961, "the equity in said property was taken by Hughes as a consideration of forbearance, and that Smith is not entitled to any single unpaid rents December 1, 1961" and that was judgment in question has not been paid by Smith either in whole or in part (emphasis mine).

The court then entered the following that Smith's exceptions to the master's report be overruled, that the report be approved and confirmed, that the costs of the referees (according to Ivan)

be taxed against Smith. On the following day (December 12, 1928) the Union Bank of Chicago accepted its appointment as receiver, and on December 18, 1928, leave was given to it to employ counsel. On January 8, 1929, the present interlocutory appeal was perfected by Smith in the Superior court.

In addition to the facts as found by the court in said "interlocutory decree" of December 11, 1928, it appeared from the evidence that, several months before the judgment by confession on the $30,000 note was entered against Smith, viz, on July 9, 1924, Hughes wrote to Smith as follows: "Your note to me for $26,000 and interest is long past due. I have been very lenient in this matter and have been waiting for you to make some payments, and I wish to inform you that if this matter is not taken care of on or before August 1, 1924, I will place it in the hands of my attorney with instructions to start suit for full amount." To this letter Smith replied under date of July 15, 1924, as follows: "I have been making every effort to clean up my obligations and avoid bankruptcy. * * You know that it was no fault of mine that the endorsers got off of this note which threw the whole burden on me. I want to call your attention, however, that the amount is not $26,000, that there is a credit due me for Motor Building bonds and also for Spencer Building bonds that were turned over to you." No mention whatever is made in this letter that the net rents over expenditures, that Hughes had been receiving from the 91st street property after December 1, 1922, should be applied on said note.

The main contention of Smith's counsel, here made, is that the chancellor erred in appointing a receiver because the evidence introduced before the master, together with Smith's sworn answer to complainant's bill, "raised such a strong presumption of full payment of the indebtedness and judgment that no receiver should have been appointed without first taking an accounting of

be taxed against Smith. On the following day (December 23, 1929) the Union Bank of Chicago accepted the assignment as trustee, and on December 26, 1929, James was given to it as equity counsel. On January 8, 1931, the present interlocutory appeal was prosecuted by Smith in the superior court.

In addition to the facts as found by the court in said "interlocutory decree" of December 11, 1930, it appeared from the evidence that, several months before the judgment by confession in the $3,000 note was entered up in Smith, viz., on July 1, 1929, Hughes wrote to Smith as follows: "Your note is due for $3,000 and interest in long past due. I have been very lenient in this matter and have been waiting for you to make some payments, and I wish to inform you that if this matter is not taken care of on or before August 1, 1929, I will place it in the hands of my attorney with instructions to start suit for full amount." On this letter Smith replied under date of July 12, 1929, as follows: "I have been making every effort to clean up my obligations and need considerably. . . . You know that it was on basis of time that the interest got off of this note which there was quite bright on me. I want to call your attention, however, that the amount is not $3,000, but there is a credit due me for Auber Building bonds and also for Pioneer Building bonds that were turned over to you." Mr. Smith maintains in this letter that the net income over expenditures, that Hughes had been receiving from the Auber property after January 1, 1922, should be applied on said note.

The main contention of Smith's counsel, here and, in that the chancellor erred in appointing a receiver because the evidence introduced before the master, together with Smith's own answer to complainant's bill, "raised such a strong presumption of full payment of the indebtedness as judgment that no receiver should have been appointed without first taking an accounting of

the rents and other proceeds of the 91st street property." It is argued that the evidence showed that the property was conveyed by Hughes to Smith in 1920 and "remained in him notwithstanding the destruction of the deed by Smith," and that "no settlement transferring Smith's title to the 91st street property to Hughes was shown." After reviewing the evidence we cannot agree with the contention or the arguments. We think that the clear preponderance of the evidence discloses that about December 1, 1922, by agreement of the parties, Hughes became the owner of the 91st street property, subject to a large mortgage thereon, - he taking it over at a valuation of the equity at $25,000; that Smith was not entitled to an accounting as to the rents of the property received after said date; and that no such presumption, as contended, can properly be raised.

Nor do we think there is any merit in counsel's further contention that, under the pleadings and the evidence, sufficient cause for the appointment pendente lite of a receiver of Smith's assets was not shown. That he has some assets which in equity should be applied to the payment of the indebtedness, as evidenced by the judgment, sufficiently appears. Exactly how much remains unpaid on the indebtedness and on the judgment is uncertain, but it is plain that it is considerably in excess of $19,000. The only real objection to the appointment of a receiver, as urged by Smith in the Superior court, was that the indebtedness and judgment had fully been paid and satisfied. When the motion for the receiver first was made he offered to prove such payment and satisfaction by evidence, and the court held the motion in abeyance pending a reference to a master to ascertain the facts on this one issue.

Counsel further contend that the order appointing the receiver is erroneous because neither a bond by the complainant was filed nor did the court state in the order of appointment any facts

the terms and other proceeds of the first street property." It is argued that the evidence showed that the property was sold by Hughes to Smith in 1970 and "remained in the ownership" the destruction of the deed by Smith," and that "he willingly transferred title to the first street property to Hughes and wanted." After reviewing the evidence we noted, yes with the conclusions of the appellants. We think that the clear preponderance of the evidence showed that about January 1, 1971, by agreement of the parties, Hughes became the owner of the first street property, subject to a large mortgage thereon, - he having it assumed; ownership of the equity as $25,000; and that Smith was not entitled to be concerned as to the terms of the property purchase other with Hughes; nor that in such purchase, as contended, one properly be taken.

Nor do we think there is any merit in counsel's further contention that, under the pleadings and the evidence, sufficient cause for the appointment pendente lite of a receiver of Smith's assets was not shown. That he had some assets which in equity should be applied to the payment of the judgment, is evidenced by the judgment, unfailingly appears. Probably has such remains equally as the indebtedness and on the judgment in question, but it is plain that it is unmistakably in excess of $25,000. The only real objection to the appointment of a receiver, as urged by Smith in the superior court, was that the indebtedness and judgment had fully been paid and satisfied. Then the motion for the receiver first was made he offered to prove such payment and satisfaction by evidence, and the court held the motion in abeyance pending a reference to a master to ascertain the facts on this one issue.

Counsel further contend that the order appointing the receiver is erroneous because neither a bond by the complainant was filed nor did the court strike in the order of appointment any facts

showing why the filing of such a bond should be excused. It is provided in the Chancery Act (Cahill's Stat. 1927, Chap. 22, p.24) that before a receiver shall be appointed the party making the application shall give a bond, "provided, that bond need not be required when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver ought to be appointed without such bond." In the order appointing the receiver in the present case it is stated "that for good cause shown the bond of complainant be and the same is hereby waived and excused." It is argued that the order appointing the receiver was improperly entered because it does not appear from that order (a) that a full hearing was had on the motion for the appointment, (b) that the court was of the opinion that the appointment should be made without a complainant's bond, and (c) that no facts or reasons are recited for the court's action. Counsel cite the cases of Sherman Park Bank v. Loop Office Building Corp., 238 Ill. App. 450, 451, and Watson v. Gudney, 144 id. 624, 629, in support of their contention. In our opinion these decisions should not here be applied. In the present case two orders were entered on the same day - one appointing the receiver and the other an "interlocutory decree," from the findings of which latter order appear good and sufficient facts and reasons why a receiver should be appointed and without requiring complainant to give a bond. Considering these two orders together we think it appears that there was a sufficient compliance with the statute referred to, and that the appointment of the receiver without a complainant's bond was fully justified. For the reasons indicated the interlocutory order or decree of December 11, 1928, appointing the receiver, is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

showing why the filing of such a bond should be excused. It is provided in the discretion of [illegible] [illegible], [illegible] that before a receiver shall be appointed the party seeking the application shall give a bond, "provided, that bond need not be required when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver ought to be appointed without such bond." In the order appointing the receiver in the present case it is added "that for good reasons shown the bond of complainants be and the same is hereby waived and dispensed." It is argued that the order appointing the receiver was improperly entered because it does not appear "from that order: (a) that a full hearing was had on the motion for the appointment, (b) that the court was of the opinion that the appointment should be made without a complainant's bond, and (c) that no finding of reasons are recited for the court's action." Counsel cite the case of Dunham Lock Co. v. Lock Office Building Corp., 227 Ill. App. 497, 499, and Lehman v. Lehman, 144 Ia. 494, 499, in support of their contention. In our opinion these decisions should not have be applied. In the present case the orders were entered on the same day - one appointing the receiver and the other on "interlocutory decree." From the findings of which latter order appear good and sufficient facts and reasons why a receiver should be appointed and without requiring complainant to give a bond. Considering these two orders together we think it appears that there was a sufficient compliance with the statute referred to, and that the appointment of the receiver without a complainant's bond was fully justified. For the reasons indicated the interlocutory order or decree of December 11, 1933, appointing the receiver is affirmed.

AFFIRMED.

Dunham and P. Jones, JJ., concur.

219

32445

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. Rush,
Defendant in Error,

v.

FRANCES BAROCH,
Plaintiff in Error.

ERROR TO COUNTY COURT, COOK COUNTY.

252 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was appointed and served as a judge of election in the City of Chicago at the regular election held November 2, 1926. She was afterward cited before the county court in contempt proceedings for alleged misbehaviour in said office, in accordance with the provisions of section 13, article II of the City Election act. On the hearing she was adjudged guilty of contempt for wilful violation of certain provisions of said act pertaining to the duties of an election judge and was sentenced to jail for one year.

The only point made and argued here is that plaintiff in error being a woman was ineligible, as the statute then stood, to serve as such judge of election and therefore the court acted beyond its authority in entering such order.

This same point was urged before the Supreme Court upon a like proceeding and a like state of facts in People etc. ex rel. Rush v. Tina Wortman and Leona Coine, 334 Ill. 298. The two women in that case served as judge and clerk respectively in the same city and at the same election, and were cited for contempt in a like proceeding under the same statute. They were adjudged guilty and the conviction was upheld on the ground that "they having

38618

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel. Rush,
Defendant in Error,

v.

HARRIET [illegible],
Plaintiff in Error.

ERROR TO COUNTY COURT OF COOK COUNTY.

289 I.A. 655

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was appointed and served as a judge of election in the City of Chicago at the regular election held November 2, [illegible]. She was afterward cited before the county court in contempt proceedings for alleged misbehavior in such office, in accordance with the provisions of section 11, article 11 of the City Election Act. On the hearing she was adjudged guilty of contempt for wilful violation of certain provisions of said act pertaining to the duties of an election judge and was sentenced to jail for one year.

The only point made and argued here is that plaintiff in error being a woman was ineligible, as the statute then stood, to serve as such judge of election and therefore the court acted beyond its authority in entering such order.

This same point was urged before the Supreme Court upon a like proceeding and a like point in People ex rel. [illegible] v. [illegible], [illegible] Ill. [illegible]. The two women in that case served as judge and clerk respectively in the same city and at the same election, and were cited for contempt in a like proceeding under the same statute. They were adjudged guilty and the conviction was upheld on the ground that "they having

accepted the appointment and entered upon the performance of the duties of their offices they became such officers de facto, and neither their eligibility to appointment nor the validity of their official acts can be inquired into except in a proceeding brought directly for that purpose."

That decision being conclusive of the questions raised here upon a like record, the judgment of the county court is affirmed.

AFFIRMED.

Gridley, P. J., and Seanlan, J., concur.

accepted the appointment and entered upon the performance of the duties of their offices they become such officers de facto, and neither their eligibility to appointment nor the validity of their official acts can be disputed in a proceeding brought directly for that purpose."

That decision rests necessarily on the proposition that upon a like issue, the judgment of the county court is affirmed.

AFFIRMED.

Grimley, J., and Sommers, J., concur.

33156

HARVEY B. CROSS, for the
use of R. T. BRACKETT,
Plaintiff in Error,

vs.

OLIVER J. CHAMBERS,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

252 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The action below was predicated on the following contract:

"October 1st, 1924.

Received of O. J. Chambers, note and mortgage, securing same for forty thousand ($40,000) dollars, dated September 12, 1924, in favor of E. M. Allen, signed John Kutchler, Alicia P. Kutchler, and Martha Kutchler, endorsed by E. M. Allen.

It is understood that this mortgage and note shall be sold, and out of the net proceeds the undersigned shall be entitled to deduct the sum of Seven Hundred ($700) dollars, expense incurred in securing the abstract, and recording of mortgage.

If said mortgage is not negotiated within ten (10) days, it is to be returned to O. J. Chambers, with the understanding that when the mortgage is negotiated, out of the net proceeds the undersigned is entitled to the above mentioned sum of Seven Hundred ($700) dollars.

(Signed) H. F. Cross.

Accepted:
O. J. Chambers."

The cause was tried before the court without a jury. At the close of plaintiff's case, consisting of his own testimony and an examination of defendant under sec. 33 of the Municipal Court Act, the court on defendant's motion directed a verdict to find the issues against the plaintiff.

It appears from the evidence that each of the parties purported to be acting in a representative capacity, plaintiff as "attorney" for one Brackett, and defendant as "attorney" for the makers of the note or notes and mortgage mentioned in the agreement, and that said makers had authorized defendant to sell the said notes and mortgage. No proof, however, was made

as to the details or the extent of such authority. Nor was there proof of the arrangements between plaintiff and Brackett for whose use plaintiff sued. As set forth in the evidence Brackett's position was that of a possible purchaser of the notes and mortgage to whom plaintiff took them for the express purpose of negotiating a sale of them or for his examination and consideration. Brackett kept them a few days, and in accordance with the agreement between plaintiff and defendant at the end of ten days they were returned by plaintiff to defendant. After holding them in his possession about one or two weeks defendant returned them to the makers on their demand.

Plaintiff testified that after getting the notes and mortgage he made two trips to the location of the property and that Brackett advanced him the money therefor. The contract when signed evidently contemplated an expense of $500 "in securing the abstract, and recording of mortgage." It was subsequently changed to $700. Defendant denied knowledge of any such change and testified that he never assented thereto. But we think the point immaterial as we do not think plaintiff could recover on the evidence.

The action is brought on the theory that Brackett advanced the money and is entitled to have the same returned to him by defendant. But the evidence does not disclose any contract between defendant and Brackett nor that Brackett advanced the money for anyone except plaintiff. What were the arrangements between him and plaintiff does not appear. If Brackett was entitled to the money from defendant the suit should have been brought in his name. The words "for the use of," etc., are mere surplusage. Plaintiff, if anybody, must recover from defendant, the contract being between them.

It is conceded that if the notes and mortgage had been sold after their return to the makers defendant would have been liable

as to the details of the case, if such matters, for an issue under of the arrangements between plaintiff and Frankie [illegible] the plaintiff made. As we have to the evidence Plaintiff's contention was that of a possible purchaser of the [illegible] plaintiff took them for the express purpose of [illegible] of them or for his examination and consideration. Frankie [illegible] them a few days, and it coincides with the general [illegible] plaintiff and returned at the end of the time they were received by plaintiff in [illegible]. After holding them in his possession about one or two weeks defendant returned them to the [illegible] in their [illegible].

Plaintiff testified that after getting the notes he mortgage he made two trips to the location of the [illegible] Frankie returned him the money therefor. He [illegible] evidently contemplated an exchange of [illegible] the property, the [illegible] and receiving of mortgage." It was subsequently proved to [illegible] Defendant denied knowledge of any such change and testified that he never received [illegible]. But we think the point [illegible] to be do not match plaintiff would receive on the evidence.

The action is brought on the theory that Frankie advanced the money and if satisfied is there not some [illegible] him by defendant. But the evidence was not sufficient to satisfy between defendant and Frankie but that Frankie advanced the money for anyone except plaintiff. Just here the correspondence between him and plaintiff does not appear. If Frankie was entitled to the money from defendant the suit should have been brought in his name. The words "for the use of," etc., are mere surplusage. Plaintiff, if anybody, must recover from defendant, the contract being between them.

It is conceded that if the notes are mortgage had been sold after their return to the Bowers defendant would have been liable

under the contract to pay plaintiff the amount agreed upon, whatever it was, defendant voluntarily binding himself to pay plaintiff such expense out of the net proceeds of the sale. But there was no proof of any sale nor of any guaranty by defendant that there would be one. Without proof of one or the other there is no basis for plaintiff's theory that by returning the documents to the makers on their demand defendant put it beyond his power to carry out his agreement and hence will not be allowed to avail of the non-performance he himself has occasioned. That defendant had the right to entrust the papers to plaintiff for ten days to negotiate a sale may be assumed. But that defendant had a right or power to withhold them from the makers and owners of the papers after that time, at least beyond the time they demanded their return, is not shown and will not be presumed. There being no proof of Chambers' right to hold the papers after they were demanded by the makers thereof or that he guaranteed that they would be sold, we fail to see that plaintiff made out a case of liability against defendant.

In the absence of proof of defendant's right to hold the papers until a sale was negotiated or that he guaranteed a sale, we think the words in the agreement "when the mortgage is negotiated" must be construed "if" negotiated, and that the words "shall be sold" must be construed "may" be sold. It must be inferred that defendant's authority to negotiate a sale after the papers were returned on the makers' demand was terminated and that the agreement was made with knowledge of defendant's limited authority. If plaintiff was dealing with Chambers as a special agent and not in his individual capacity he was bound to inquire into the extent of his authority. We think the court was justified in directing a verdict.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

under the contract to pay plaintiff the amount agreed upon, assuming it was, defendant voluntarily limited himself to pay plaintiff such amounts out of the net proceeds of the sale. The bill fails to show any proof of any sale nor of any authority by defendant from Chambers to sell. Without proof of one or the other there is no basis for plaintiff's theory that by retaining the documents in the manner he has done defendant put it beyond his power to carry out his agreement and hence will not be allowed to avail of the advantage which he himself has occasioned. That defendant had the right to account the papers to plaintiff for the work he performed a sale may be assumed. But that defendant had a right of power to withhold them from Chambers and owners of the papers after that time, it being shown that they demanded their return, it was shown did not and was not warranted. There being no proof of Chambers' right to deny his papers after they were demanded by the owners (except in that he indicated that they would be sold), we fail to see that plaintiff has made a case of liability against defendant.

In the absence of proof of defendant's right to hold the papers until a sale was negotiated or that he controlled a sale, we think the words in the agreement "when the purchase is negotiated" must be construed "if" negotiated, and that the words "which we might" must be construed "may" be sold. It must be inferred that defendant's authority to negotiate a sale after the papers were demanded by the owners' demand was terminated and that the appellant was with knowledge of defendant's limited authority. If plaintiff was dealing with Chambers as a special agent and not in his individual capacity he was bound to inquire into the extent of his authority. We think the court was justified in directing a verdict.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

33136

EDWARD WREMN,
Appellant,

v.

WILLIAM C. PFEIFFER,
alias Charles Pfeiffer,
etc.,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff was the agent of a life insurance company through whom defendant, William C. Pfeiffer, applied for two policies for life insurance upon his own life, payable to his estate. Plaintiff advanced the money for the premiums for which said Pfeiffer gave his check for $36.50, and his personal note for $175 payable to plaintiff. Neither check nor note was paid. Plaintiff sued to recover their amount and made the wife of said Pfeiffer a party defendant on the theory that such insurance affords "protection" for the family and the payment of premiums therefor is a family expense under the statute (sec. 15, ch. 68). The court before whom the case was tried without a jury gave judgment against the husband and dismissed the case as to the wife. Plaintiff appeals.

The only question presented is whether such indebtedness constitutes a family expense under the statute.

Appellant states that the question has never been decided in this state or in other states having a like statute. But we fail to see that the case comes within the reasoning of the numerous cases that have arisen under either our statute or a like statute in other states.

Mr. Ch. Ch. Justice HALTSCHEK THE OPINION OF THE COURT.

Plaintiff was the agent of a life insurance company through whom Zafrowski, William C. Pfeiffer, applied for two policies for life insurance upon his own life, payable to his estate. Plaintiff procured the money for the premiums for which said Pfeiffer gave his check for $48.00, and his promissory note for $175 payable to plaintiff. Neither check nor note was paid. Plaintiff used to recover their amount and sued the wife of said Pfeiffer a party defendant on the theory that such insurance effects "production" for the family and the premiums in question thereof is a family expense under the statute (sec. 14, ch. 68). The court below when the case was tried without a jury gave judgment against the husband and dismissed the case as to the wife. Plaintiff appeals.

The only question presented is whether such insurance constitutes a family expense under the statute.

Appellant admits that the question has never been decided in this state or in other states having a like statute. But we fail to see that the case comes within the reasoning of the numerous cases that have arisen under either our statutes or a like statute in other states.

The usual test is whether the expenditure was incurred for, on account of, and for use in the family (Von Platen v. Krueger, 11 Ill. App. 627; Smedley v. Felt, 41 Ia. 588); and when for articles whether they are actually used or kept for use in the family (Hyman v. Hadley, 162 Ill. 357; Fitzgerald v. McCarty, 55 Ia. 702.) Even though a husband may obtain the means of supporting the family and defraying their expenses by expenditures in business enterprises they are not deemed "family expenses" (Von Platen case, supra, and Hyman case, supra.) Discussing the scope of the statute in the latter case the court said that it does not include business expenses incurred "merely to secure the means to maintain the family."

But we know of no case where the expenditure has been held to embrace expense for something the use of which depended upon some future possibility or remote contingency. Assuming the family might get the benefit of the insurance payable to the estate, yet such benefit depends on the husband's death, or possibly if the policy has a surrender value, on the use that might be made of money derived therefrom. The statute is not remedial. It is strictly construed. (Featherstone v. Chapin, 93 Ill. 223.)

But the case reduces itself to a claim against the wife for money advanced to the husband to pay for something that cannot be put to any direct or immediate use for the family. In that respect we think it is outside the scope of the statute.

Our statute was adopted from the Iowa statute and we have adopted the interpretation placed upon it by the Iowa State Supreme Court. That court said in Davis v. Mitchey, 55 Ia. 719:

> "The statute was enacted for the benefit of the husband or wife and person from whom the things constituting the family expense were obtained, to the end that credit could be obtained and extended for something essential, necessary or convenient, or so

The usual test is whether the [illegible] for account of, and for use in the family [illegible] v. [illegible], 12 III. App. 227; [illegible] v. [illegible], 41 Ia. 673; [illegible] articles whether they are actually used or kept for use in the family (Brown v. Taylor, 142 Ill. 207; [illegible] v. [illegible], 80 Ia. 723.) Even though a business may divide the income of supporting the family and defraying their expenses by [illegible] in business enterprises they are not drawn "family expenses" (Van [illegible] Adams, and Brown case, supra.) [illegible] the origin of the debts in the latter case the small bills that is made for [illegible] expenses included "family" to which the term in [illegible] the family.)

But we know of no case where the supreme [illegible] held to construe expense for constructing the use of which expenses upon some future possibility or remote contingency. [illegible] the family might yet the benefit of the [illegible] property to the [illegible] yet such benefit depends on the husband's death, or possibility of his policy had a monetary value, or the use that might be used at some derived therefrom. The statute is not remedial. It is [illegible] construed. (Dalbergerson v. Chase, 97 Ill. 518.)

But the case relied upon itself is a clear opinion in which for many reasons to the husband is not for exercising that income be put to any direct or immediate use for the family. In that respect we think it is outside the scope of the statutes.

The statute was adopted from the [illegible] and we have adopted the interpretation placed upon it by the [illegible] supreme court. That court said in Lyle v. [illegible], 97 Ia. 721:

> The statute was enacted for the benefit of the husband as well as wife and persons from whom the income came. Relatively the family expenses were abolished, in the sense that credit could be obtained and exercised for reasonable essential, necessary or [illegible], or so

> deemed by the husband or wife, to be used in or by the family. Money cannot be so used. Therefore it cannot be a family expense even if borrowed for the family. It may be, and in the present case was, used to procure what, if obtained on credit, would have been a family expense."

The case is no different from a suit brought for money borrowed by the husband for which there would be no liability on the part of the wife whatever it might be used for.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

deemed by the husband or wife, so he used it or by the family. Money could be so used. Therefore it cannot be a family expense even if borrowed for the family. It may be, and in the present case was, used to procure what, if obtained on credit, would have been a family expense."

The case is no different from a wife ordering her money borrowed by the husband for which there would be no liability on the part of the wife whatever it might be used for.

The judgment is affirmed.

(Signed)

Gridley, J., and Conley, J., concur.

33192

MADISON SASH & DOOR COMPANY,
a corporation,
Appellee,

v.

FRANK PORTER LUMBER COMPANY,
a corporation, and FREDERICK
L. BROWN, doing business as
FREDERICK L. BROWN LUMBER COMPANY,
Defendants.

ON APPEAL OF THE FRANK PORTER
LUMBER COMPANY, a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

252 I.A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a fourth class case. Defendant Frederick L. Brown was defaulted. To plaintiff's statement of claim appellant filed its affidavit of merits. The trial was had before the court without a jury, and this appeal is from a judgment against appellant for $700.08 and costs.

Plaintiff's claim is predicated upon a right to the return of money paid to appellant through mistake and inadvertence. The facts are set out at some length in the statement of claim to the effect that plaintiff bought a car of lumber from the Gideon-Anderson Company of St. Louis, and has paid the same therefor; that before making the payment it received from appellant an invoice of the same lumber from the Frederick L. Brown Lumber Company to plaintiff that purported to be assigned to appellant, and that through mistake and inadvertence plaintiff's clerk or bookkeeper, without plaintiff's knowledge of the facts respecting said invoice, paid appellant therefor on receiving such invoice so assigned; that plaintiff had no dealing for said car either with said Brown or

33129

MARION LUMBER & TIE COMPANY,
a corporation,
Appellee,

v.

FRANK POPLIN-FRANCIS COMPANY,
a corporation, and Frank Poplin
L. Brown, doing business as
FRANCIS LUMBER COMPANY,
Defendants.

ON APPEAL OF THE FRANK POPLIN-
FRANCIS COMPANY, a corporation,
Appellant.

MR. JUSTICE BERRY DELIVERED THE OPINION OF THE COURT.

This is a fourth class case. Defendant Francis L. Brown was defaulted. To plaintiff's statement of claim appellant filed its affidavit of merits. The trial was had before the court without a jury, and this appeal is from a judgment against appellant for $700.00 and costs.

Plaintiff's claim is predicated upon a right to the return of money paid to appellant through mistake and inadvertence. The facts are set out at some length in the statement of claim to the effect that plaintiff bought a car of lumber from the Ullman-Anderson Company of St. Louis, and has paid the same therefor; that before making the payment it received from appellant an invoice of the same lumber from the Fred-Rick L. Press Lumber Company to plaintiff that purported to be rendered to appellant, and that through mistake and inadvertence plaintiff's clerk or bookkeeper, without plaintiff's knowledge of the facts respecting said invoice, paid appellant therefor on receiving such invoice on contention that plaintiff had no dealing for said car either with said Press or

appellant and was not indebted to either, and there was no consideration for such payment.

Defendants' affidavit of merits states that the payment was made on account of lumber and materials sold by Brown to plaintiff and accepted by the latter, and that the invoice to plaintiff therefor was duly assigned by Brown to appellant for a good and valuable consideration paid to Brown by appellant, and that plaintiff had full notice of the assignment. It will be seen that the affidavit took issue only as to whether there was a sale of the lumber in question by Brown to plaintiff. In other words, if plaintiff actually bought from Brown there was no mistake.

On the hearing the president of appellant was called under section 33 of the Municipal Court Act. He admitted the payment by plaintiff to appellant and that the car of lumber was not sold by appellant to plaintiff. Plaintiff's president then testified that he did not buy the car of lumber from the Brown Lumber Company and was not indebted to the same but bought it from the Gideon-Anderson Company; that he signed a check for appellant through the fault of the bookkeeper, and when the mistake was discovered demanded of appellant the return of the money; that plaintiff did not receive the lumber on the Brown invoice and knew nothing of such invoice, and later plaintiff paid the Gideon-Anderson Company, as the result of a suit brought by such company.

None of plaintiff's evidence was denied. In defense appellant's president testified that plaintiff had paid appellant for lumber on other prior invoices of the Brown Lumber Company assigned to appellant. That evidence, however, had no material bearing on this transaction. He further testified that appellant paid Brown for the carload in question; that Brown was to use the

appellant and was not interested in either, and there was no consideration for such payment.

Defendants' affidavit or merits states that the payment was made on account of lumber and materials sold by Brown to plaintiff and accepted by the latter, and that the invoice to plaintiff therefor was duly assigned by Brown to appellant for a good and valuable consideration paid in great by appellant, and that plaintiff had full notice of the assignment. It will be seen that the affidavit does issue only as to whether there was a sale of the lumber in question by Brown to plaintiff. In other words, if plaintiff actually bought from Brown then she is minister.

On the hearing the president of appellant was called under section 55 of the Municipal Court Act. He admitted the payment by plaintiff to appellant and that the car of lumber was not sold by appellant to plaintiff. Plaintiff's president then testified that he did not buy the car of lumber from the Brown Lumber Company and was not indebted to the same but bought it from the Bidwell-Wilkeson Company that he signed a check for appellant through the mail at the bankers, and when the mistake was discovered demanded of appellant the return of the money that plaintiff did not receive the lumber as the Brown Lumber Company knew nothing of such transaction, and later plaintiff paid the Bidwell-Wilkeson Company, as the result of a suit brought by such company.

Some of plaintiff's evidence was denied. In rebuttal appellant's president testified that plaintiff had paid appellant for lumber on other prior invoices of the Brown Lumber Company assigned to appellant. That evidence, however, was immaterial bearing on this transaction. On further cross-examination paid drawn for the original in question that Brown was to use the

check to pay the mill to cover the invoice; that the mill, he believed, was the Gideon-Anderson Company; that when the carload of lumber was received it was billed by said Brown, and that appellant's check to the Brown Lumber Company was based on the invoice assigned to it and sent to plaintiff. But appellant made no proof of any actual purchase of the lumber by Brown or of any transaction whereby it became possessed, if ever, of the lumber. Brown did not testify. Appellant's president said he was unable to locate him. A letter from appellant in evidence states that it had advanced Brown money on assignments of his invoices, and in most cases he used the money so advanced to pay the mill, but latterly converted some of the money to his own uses and failed to pay the mill. It is inferable that Brown had absconded.

Plaintiff's proof that it bought the lumber in question directly from the Gideon-Anderson Company and paid the same therefor was not controverted. Appellant's proof of its transaction with Brown had no tendency to rebut it or to establish an obligation by plaintiff to the Brown Lumber Company, or even to show that Brown ever acquired title to the lumber or had any more right than a stranger to invoice it to plaintiff. It may perhaps be inferred from appellant's letter that the car of lumber was originally invoiced by the Gideon-Anderson Company to Brown, and that he failed to pay for or to accept the same. There was no direct proof on that subject one way or the other, except admissions by Brown that were not binding on appellant. But the mere fact that plaintiff paid appellant as assignee of previous invoices from the Brown Company to plaintiff had no tendency to prove that the Brown Company ever owned or had the lumber in question. There was direct proof on the part of plaintiff that it had no dealing with the Brown Company therefor.

check to pay the bill to cover the lumber; that the bill, he believed, was the Gideon-Anderson Company's that when the original of lumber was received it was billed by mistake, and that appellant's check to the Brown Lumber Company was based on the invoice assigned to it and was so plaintiff. The appellant made no proof of any actual purchase of the lumber by Brown or of any transaction whereby it became possessed, if ever, of the lumber. Brown did not testify. Appellant's president said he was, and is, to locate him. A letter from appellant in evidence states that it had advanced Brown money on assignments of his invoices, and in most cases he used the money to advance to pay the bill, and latterly converted some of the money to his own uses and failed to pay the bill. It is inferable that Brown had absconded.

Plaintiff's proof that it bought the lumber in question directly from the Gideon-Anderson Company and paid the bill therefor was not controverted. Appellant's proof of its transaction with Brown had no tendency to rebut it or to establish its obligation by plaintiff to the Brown Lumber Company, or even to show that Brown ever acquired title to the lumber or had any more right than a stranger to invoice it to plaintiff. It may perhaps be inferred from appellant's letter that the use of lumber was criminally involved by the Gideon-Anderson Company in Brown, and that he failed to pay for or to account for some. There was no direct proof in that respect one way or the other, except explanations by Brown that were not binding on appellant. The mere fact that plaintiff paid appellant on assignment of previous invoices from the Brown Company to plaintiff had no tendency to prove that the Brown Company ever owned or had the lumber in question. There was direct proof on the part of plaintiff that it had no dealing with the Brown Company there or,

Appellant did not attempt to prove it did but relied wholly on the face of the invoice of which plaintiff's president who signed the check to appellant had no knowledge. The evidence stands unimpeached that plaintiff's check was signed by plaintiff's president and sent through mistake and inadvertence of the bookkeeper who supposed it represented a genuine transaction.

Appellant invokes the principle that a payment voluntarily made by mistake may not be recovered. But that is where the payment is made without knowledge of the facts. Here the payment was made by one ignorant of them and may be recovered back. (Stempel v. Thomas, 89 Ill. 146; West Frankfort Bk. & Tr. Co. v. Barretti, 206 Ill. App. 261.)

Nor can we apply to the facts the doctrine where two innocent persons suffer a loss through a third party, the one through whose instrumentality it is sustained must bear the loss. It does not appear that appellant was induced to pay Brown by any act of plaintiff's. Plaintiff was not responsible for the invoice made out by Brown or appellant's advance of money on the strength thereof. It is well settled that where money is paid by mistake without knowledge of the facts and the party to whom it is paid had no right in equity and good conscience to the same it may be recovered back under assumpsit for money had and received. The evidence discloses this is such a case.

It is also urged that the court had no jurisdiction because the case was reinstated more than 30 days after a dismissal of the suit for want of prosecution. But it was reinstated upon stipulation between the parties, which gave jurisdiction to proceed in the particular case the same as if the pleadings had been refiled.

It is also urged that the statement of claim does not state

Appellant did not attempt to prove it and but relied wholly on the fact of the invoice of which plaintiff's president has signed the check to appellant and on knowledge. The evidence is thus undisputed that plaintiff's check was signed by plaintiff's president and sent through mistake and inadvertence of the bookkeeper who supposed it represented a genuine transaction.

Appellant invokes the principle that a payment voluntarily made by mistake may not be recovered. But this is where the payment is made without knowledge of the facts. Here the payment was made by one ignorant of them and may be recovered back. (Leonard v. Lagomarsino, 25 Ill. App. 2d 111, 165; East Kensington Dr. & Tr. Co. v. Kenwalli, 342 Ill. App. 261.)

Nor can we apply to the facts the doctrine where the innocent payment enters a loan through a third party, the creditor whose instrumentality it is mistaken must bear the loss. It does not appear that appellant was induced to pay Brown by any act of plaintiff's. Plaintiff was not responsible for the invoice and was not by Brown or appellant's advance of money on the strength thereof. It is well settled that where money is paid by mistake without knowledge of the facts and the party to whom it is paid had no right in equity and good conscience to the case it may be recovered back under assumpsit for money had and received. The evidence clearly shows in such a case.

It is also urged that the court had no jurisdiction because the case was terminated more than 30 days after a dismissal of his suit for want of prosecution. But it was terminated upon stipulation between the parties, which gave jurisdiction to proceed to the particular case the same as if the pleadings had been filed.

It is also urged that the statement of claim does not state

a cause of action. It is a fourth class case. Defendant understood the nature of it well enough to go to trial on the issues raised. We have frequently held that when a defendant goes to trial without questioning the sufficiency of the statement of claim in a fourth class case he will be presumed to understand the nature of the claim, and will not be permitted to raise the question here for the first time. The statement of claim, however, contains enough on which to predicate a cause of action for the return of money paid through mistake and inadvertence, and defendant's affidavit of merits shows the issue was well understood.

It is contended that plaintiff did not make proof of all the allegations in the statement of claim. Some of them could be rejected as surplusage. Prima facie proof was made of the essential elements of the cause of action. While not very full it was not rebutted.

We need not discuss alleged incompetent testimony. The trial having been before the court without a jury it was presumptively disregarded.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

a cause of action. It is a long-ish short case. Lord[illegible] quoted the maxims of it well enough to go in a brief on the issue involved. It does frequently deal with when a defendant goes to trial without questioning the sufficiency of the allegations of a tort in a tortious claim, he will be presumed to admit the truth of the claim, and will not be permitted to raise the question for the first time. The elements of claim, however, including causation which is sometimes a cause of action for the return of money paid through mistake and inadvertence, and defendant's activity or service where the issue was well canvassed.

It is considered that principle [illegible] that some proof of all the allegations in the statement of claim. Even if claim could be rejected as surplusage. Claim fails proof was made of the essential elements of the cause of action. Also not very full it was not established.

It need not discuss alleged incompetent evidence. The trial having been before the court without a jury it was presumptively disregarded.

The judgment is affirmed.

Appeal.

Gridley, K. J., and Hoolan, J., concur.

33202

PAUL W. HERBERT,
Appellee,

vs.

EDWARD STARCZYNSKI,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 656

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff brought a suit against appellant and his wife to recover for professional legal services alleged to have been rendered to both defendants at their instance and request to remove a cloud upon the title to certain real estate then owned by Anna Jagla who subsequently became appellant's wife. An affidavit of merits was filed in behalf of both defendants denying any joint liability or employment of plaintiff by either defendant to render such services or that he ever did; also alleging that another suit brought against appellant was res adjudicata of said claim.

On the issues involved plaintiff was his only material witness. He claimed that he rendered such services on three different dates, one in December, 1926, and one in January and one in March, 1927, for which $60 was a reasonable fee. Both of the defendants testified. Each denied employing plaintiff for any such purpose. Plaintiff claimed that his services were sought because of a cloud cast upon the title to the wife's property by proceedings had in a divorce suit between appellant and his former wife which prevented his second wife Anna from procuring a loan on the property. The latter testified that she not only never sought plaintiff's services but that another attorney rendered her services in December, 1926, in procuring a loan on said property. Appellant testified that the only services rendered by plaintiff to him were those in

[illegible]

[illegible]

vs.

[illegible]

[illegible]

[illegible]

[illegible]

Liability through a suit against defendant on his wife to recover for professional legal services alleged to have been rendered to such defendant at their request was insufficient to remove a cloud upon her title to certain real estate then owned by them that was allegedly leased [illegible]'s wife. An affidavit of merits was filed in behalf of such defendants denying any joint liability or employment or liability by them; defendant to render such services or that he ever had any dealings with plaintiff and brought another suit against the [illegible] of said claim.

On the issues involved liability was the only material witness. It appeared that he rendered said services on these litigant dates, was in December, 1976, and was in January and in June, 1977, for which [illegible] was a reasonable fee. [illegible] the reasonable services. Then denied employing plaintiff for any such purpose. Plaintiff claimed that his services were sought because of a cloud cast upon [illegible] title to the wife's property by [illegible] had in a divorce suit between [illegible] and his former wife which prevented his client with [illegible] from [illegible] a loan on the property. The latter testified that she not only [illegible] plaintiff's services but that another attorney rendered her services in January, 1976, in procuring a loan on said property. Defendant testified that the only services rendered by plaintiff to [illegible] were those in

connection with the divorce action and contempt proceedings connected therewith, and that a judgment was obtained against him upon a suit brought by plaintiff to recover the value of his services in connection therewith, and that he never sought plaintiff's services in any other matter.

After reading the testimony we are of the opinion that even if plaintiff had a right of action against appellant alone the finding of the court was against the weight of the evidence. The burden of proof rested upon plaintiff and we do not think he sustained it. Not only did both defendants deny procuring him to render services to remove a cloud upon the title of said property, but it appears that the purpose of the services claimed by plaintiff, namely, to enable procurement of a loan on the property, had been met by the services of another attorney for appellant's wife in December, 1926. It appears also that plaintiff rendered appellant services during the same interval in connection with procuring his discharge from payment of alimony to his first wife, and in that connection had occasion to look up the condition of the title to the property belonging to the second wife. We think it may well be inferred that the services he rendered were in connection with the alimony proceedings and were covered in the suit he brought to recover for services rendered in the divorce and alimony proceedings. In that suit plaintiff included other items than his fees for the divorce proceedings, and as he had already rendered the services in connection with said real estate it is strange that he should not have included his fees therefor in the same suit if he had a bona fide claim for them outside of fees for services in the other matters.

Not only do we think that the finding of the court was against the weight of the evidence but plaintiff's claim is predicated upon a joint liability in an action ex contractu. It

connection with the tires sold and without proceeding concerted fraudulently, and that a judgment was obtained against him upon a suit brought by plaintiff to recover the value of the services in connection therewith, and that he never received sufficient services in any other matter.

After reading the testimony we are of the opinion that even if plaintiff had a right of action against defendant alone the finding of the court was against the weight of the evidence. The burden of proof rested upon plaintiff and we do not think he sustained it. Not only did both defendants deny promising him to render services to secure a bond upon the tires of said property, but it appears that the purpose of the services claimed by plaintiff, namely, to obtain postponement of a lien on the property, had been met by the services of another attorney for respondents's wife in December, 1924. It appears also that plaintiff rendered appellant services during the time interval in connection with procuring his discharge from bankruptcy of himself to his first wife, and in that connection had occasion to look up the condition of the title to the property belonging to the second wife. We think it may well be inferred that the services he rendered were in connection with the alimony proceedings and were covered in the suit he brought to recover for services rendered in the divorce and alimony proceedings. In view that plaintiff included other items than his fees for the divorce proceedings, and as he had already received the services in connection with said real estate it is strongly that he would not have included his fees therefor in the same suit if he had a bona fide claim for them outside of fees for services in the other matters.

But only so we think that the finding of the court was against the weight of the evidence but plaintiff's claim is predicated upon a joint liability to be proven by evidence. It

is fundamental that in such an action recovery must be had if at all against all the parties unless the plaintiff amends his pleadings and dismisses as to such defendants as are not shown to be liable with the others. (Powell v. Winn, 198 Ill. 567.) Plaintiff's evidence purported to support a claim of joint liability. The wife was dismissed out of the suit at the end of the case by the court. There was no amendment of the statement of claim. The court should have found for appellant. We need not decide whether an amendment of pleadings was necessary in the Municipal court, for certainly it takes from the force of plaintiff's claim that he testified that his services were requested by both defendants, and on their testimony the court found there was no liability as to one of them. We need not discuss the question of res adjudicata so long as the weight of the evidence is against plaintiff's claim.

The judgment will be reversed and a judgment will be entered here upon a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Scanlan, J., concur.

In fundamental that is such an action inherently lies in tort of a
suit against all the parties unless the plaintiff sought and plead-
ings and dismisses as to each defendants of his not shown to be
liable with the others. (Jewell v. Ring, 124 Ill. 324.) Plain-
tiff's evidence purported to support a claim of joint liability.
The wife was dismissed out of the suit at the end of the case by
the court. There was no amendment of the statement of claim. The
court should have found for appellants. It need not decide whether
an amendment of pleadings was necessary in the instant court, for
certainly it takes from the force of plaintiff's claim that he
established that his services were rendered by both defendants, and
on their behalf; the court found there was no liability on the
of them. It need not discuss the question of the application of
law as the weight of the evidence is against plaintiff's claim.

The judgment will be reversed and a judgment will be
entered here upon a finding of fact.

REVERSED AND JUDGMENT ON FACT.

Gridley, P. J., and Creslen, J., concur.

FINDING OF FACT.

We find that appellant did not specially contract for the services for which appellee has brought suit, and that such services were incidental to those already paid for.

33217

A. W. JENSEN,
Appellant,
v.
DAVID A. KASK and
JEAN KASK,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order vacating and setting aside for naught a judgment by confession in favor of plaintiff on defendant's promissory note entered May 25, 1928, for $890.97, and for a judgment against plaintiff for costs of the suit.

The judgment was reopened on the affidavit of David A. Kase to the effect that the note was paid by acceptance of an order on the Hill State Bank October 26, 1925.

The hearing discloses the following state of facts: Plaintiff did the mason work on two buildings erected by defendant David Kase, situated at the northeast corner of Montrose and Kenneth avenues, Chicago, one known as 4428 Montrose avenue, and the other as 4407 Kenneth avenue. The contract for plaintiff's services, dated May 15, 1925, called for completion of his work for the sum of $25,500, 85 per cent to be paid as the work progressed, and the entire amount upon completion. Plaintiff completed the mason work on the Montrose building, except the cleaning of the building, about August 20, 1925, and the work on the other building about a week before. The cleaning amounted to about a "couple of hundred dollars" and was done about a week later. Defendant David Kase obtained two loans, one on the Kenneth building from the Ritchie Bond & Mortgage

[illegible]

A. W. [illegible], [illegible] appellants,

v.

[illegible] KAHN and
ITKA KAHN,
appellees.

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order vacating and setting aside for naught a judgment by confession in favor of plaintiff on defendant's promissory note entered May 12, 1924, for [illegible], and for a judgment against plaintiff for costs of the suit.

The judgment was reopened on the affidavit of Louis A. Kaan to the effect that the note was paid by overpayment of an order on the Hill State Bank October 20, 1922.

The bonding discloses the following facts of issue: Plaintiff did the masonry work on the building erected on defendant land lease, situated at the northeast corner of Lawrence and Kenmore avenues, Chicago, one block on 4800 Lawrence avenue, and the other on 4807 Kenmore avenue. The contract for plaintiff's services, dated May 13, 1922, called for completion of his work for the sum of $22,500.00 per week to be paid on the work performed, and the entire amount upon completion. Plaintiff completed his masonry work on the Kenmore building, except the cleaning of the building, about August 27, 1922, and the work on the Lawrence building about a week before. The cleaning amounts to about a "couple of months [illegible]" and was done about a week later. Defendant lives near Lawrence and Kenmore, one on the northeast building from the [illegible] and a mortgage

Company, and one on the Montrose building from the Hill State Bank.

The note in question was for $3,000, dated August 19, 1925, and payable to appellant's order 30 days after its date, with interest at 6 per cent per annum until paid. On the back thereof was this endorsement at the time of its delivery: "This note is given as part payment for mason work on a 24-flat building being erected at Kenneth avenue near Montrose avenue." The note is signed by David A. Kase and his wife Jean.

The execution of the note in such form bearing such endorsement is not questioned. Nor is it questioned that at the time of the hearing there was still due plaintiff under his contract $900. The only question is whether the note was to be surrendered on plaintiff receiving an order for $10,000 on the Hill State Bank.

Plaintiff testified that nearly every day for the week before he got the note he talked to both defendant David Kase and his father Jacob Kase, who superintended work on the structure for David, with reference to his payment for the work, saying he needed the money, that he had got to have $18,000. David said he could not give that much until the building was finished; that he could not give more than $15,000 out of the loan on the Kenneth avenue building; that he would give a note for $3,000 until he could obtain a loan on the Montrose building, but he had not applied for one and did not know whether he could get it; that plaintiff said, "the only thing to do is to give me a note for $3,000 and I will hold it until I get my money." The note was then given and a few days afterwards plaintiff received two checks from the Ritchie Bond & Mortgage Company, one for $10,000 and one for $4,500. Plaintiff told defendant he was entitled to $18,000 on the Kenneth avenue building on which the loan was made. Later the Hill State Bank made a loan

Company, and one on the Dunrovin building from the Will - Lake Bank.

The note in question was for [illegible], dated [illegible], 1922, and payable in appellant's order 30 days after the date, with interest at 6 per cent per annum until paid. On the back thereof was this endorsement at the time of its delivery: "This note is given as part payment for money used on a 40-foot building being erected at Kenneth avenue near Montrose Avenue." The note is signed by David [illegible] and his wife Jane.

The execution of the note in suit [illegible] indorsement is not questioned. Nor is it contended that at the time of the hearing there was [illegible] the plaintiff [illegible] trust [illegible]. The only question is whether the note was in the hands of plaintiff [illegible] on which the [illegible] Will State Bank.

Plaintiff testifies that [illegible] before he got the note he talked to both defendants [illegible] and his father-in-law, who superintended work on the structure for David, with reference to his payment for the work, [illegible] needed the money, that he had got to have [illegible]. David said he could not give that much with [illegible] and [illegible] he could not give more than [illegible] of the loan or the [illegible] avenue building; that he could give a note for [illegible] and [illegible] could obtain a loan on the property with [illegible], but he had not applied for one and did not know whether he could get it; that plaintiff said, "the only thing to do is to give me a note for [illegible] and I will hold it until I get my money." The note was then given and a few days afterwards plaintiff received the checks from the Illinois Bank & Mortgage Company, one for [illegible] and one for [illegible]. Plaintiff said defendant he was entitled to [illegible] on the Kenneth avenue building on which the loan was made. Later the Will State Bank made a loan

to David Kase on an application therefor made August 27, 1925, and plaintiff received an order on said Hill State Bank for $10,000 October 26, 1925. To procure these orders plaintiff waived mechanics liens. Through these orders plaintiff, therefore, had received on his contract $24,600 leaving $900 due by the terms of the contract. It is defendant's claim that the note was to be surrendered when he received his $10,000 from the Hill State Bank, and plaintiff's contention that it was given as security for the balance due on the contract to represent $3,000 additional he was entitled to out of the Ritchie Company's loan when he received its two checks.

The endorsement upon the note bears out plaintiff's contention. Furthermore, the note was given before there had even been an application for a loan from the Hill State Bank. According to David Kase's own testimony he was uncertain at the time he gave the note that he could procure an additional loan or for what amount, and plaintiff denies that there was any verbal agreement to surrender the note on the payment of $10,000 out of the Hill Bank loan. It is hardly probable, therefore, under such a state of facts, that any arrangement was made for a specific $10,000 payment out of the loan that had not been obtained. Defendant's oral testimony of such an arrangement, too, was not admissible to vary the written endorsement on the note which stated that it was given as part payment for plaintiff's mason work on the building. Plaintiff's objection thereto should have been sustained.

It seems clear to us from the entire testimony, therefore, that, as stated on the endorsement, when the note was given it was given as part payment for what was then due under plaintiff's contract and that he had the right to enforce the same for the balance due thereunder after crediting the $10,000 payment. While the $10,000

is David Cone on an application filed by Cone on March 27, 1980, and plaintiff received an order on June 30th that Cone was entitled to, 1980. He learned that every plaintiff making misrepresentations. Through these certain defendants, therefore, was violated the Rule amounts $14,000 leaving $500 due by the time of the weekend. It is defendant's claim that the note was in the correspondence when he received all $1,500 from the 2001 Cone Bond, and plaintiff's evidence that it was given as security for his reliance the on the contract to repayment $2,000 originally be not entitled to any of the Atlantic Company's loan from the attorney in the case.

The conversations upon the note began when was plaintiff's transaction. Furthermore, the note was given before there was even an application for a loan from the Atlantic Bank. Accordingly to David Cone's own testimony he was insolvent at the time he gave the note that he could produce no qualified loan on his own account, and plaintiff denied that there was any verbal agreement to accompany the note as the payment of $1,500 out of the $1,500 loan. It is most improbable, therefore, that part of a right of forbearance was made for a specific $1,500 payment out of the loan that had not been obtained. Defendants' contention, if such be accurate, then, was not admissible to vary the written instrument on the note which states that it was given as part payment for plaintiff's partial work on the building. Plaintiff's objection should have been sustained.

It seems clear to us from the entire testimony, therefore, that, as stated on the undersigned, that the note was given in partial payment for work done from the same plaintiff's contract and that he had the right to enforce the same for the balance due thereunder after crediting the $1,500 payment. This the plaintiff

payment left only $900 due on the contract it is immaterial that plaintiff did not endorse a payment of $2100 on the back of the note. The note speaks for itself, and defendant was entitled to the credit thereon which plaintiff gave at the trial to the extent of $2100. We think defendants did not sustain the ground on which the judgment was opened, and that the court erred in vacating the same, and, therefore, its order vacating that judgment and entering a judgment in behalf of defendant for costs should be reversed and that a judgment should be entered here for the balance due on the note, namely, $900, together with interest thereon at the rate of 6 per cent from its date, amounting to $1099.50.

REVERSED WITH FINDING OF FACT
AND JUDGMENT HERE FOR APPELLANT.

Gridley, P. J., and Scanlan, J., concur.

33217

FINDING OF FACT.

We find that the note in question was given in part payment for mason work done by plaintiff for appellee David A. Kase, and that there is a balance due thereon of $1099.50.

33226

SCHWARZ PAPER COMPANY,
a corporation,
Appellant,

v.

CHARLES F. GAZLEY, trading
as Central Paper Co.,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit brought against defendant trading as Central Paper Company to recover payment for $3,000 worth of merchandise sold during the period from March 1 until June, 1927. In addition to the pleas of general issue special pleas were filed to the effect that the indebtedness sued for was incurred not by defendant doing business under said name but by a corporation of that name. That being the real issue on which the case was tried it is not necessary to consider any other question.

Two witnesses were called by plaintiff, Danehy, its secretary and general manager, and one Raymond, its bookkeeper - the latter to identify statements of account on defendant's stationery that accompanied payments by his check during the time of their dealings. Defendant Gazley was his only witness.

Danehy testified that in March, 1924, when he first met Gazley the latter wanted to go into the paper business and to know if plaintiff would sell merchandise on open account. Terms were discussed and Danehy suggested that for commercial purposes defendant should use a more descriptive name. He said they agreed upon the name "Central Paper Co." and defendant thereafter did business

55525

SOMMER PLUM COMPANY,
a corporation,
Appellant,

v.

CHARLES F. DAILY, trading
as Central Paper Co.,
Appellee.

Appeal from Superior Court
of King County.

Mr. Justice Mackintosh delivers the opinion of the court.

This is an action in assumpsit brought against defendant trading as Central Paper Company to recover payment for $3,000 worth of merchandise sold during the period from March 1, until June, 1927. In addition to the plank of general issue special pleas were filed to the effect that the transactions upon for was insured not by defendant doing business under said name but by a corporation of that name. That being the real issue on which the case was tried it is not necessary to consider any other question.

Two witnesses were called by plaintiff, namely, its secretary and general manager, and one Dyrcud, its bookkeeper - the latter to identify statements of account on defendant's stationery that accompanied payments by his check during the time of their dealings. Testimony taken was has not relevant.

Daily testified that in March, June, and in fact was Daily the latter wanted to go into the paper business, and he knew if plaintiff would sell merchandise on open account. Terms were discussed and Daily suggested that for commercial purposes different should use a more distinctive name. He said they agreed upon the name "Central Paper Co." and indicated that for the business

in that name; that in the latter part of 1925 defendant said he thought he would incorporate and get money into the business; that Danehy had several conversations with him later as to whether "he had incorporated" and was informed by Gazley that he had not, but would inform Danehy as soon as he had. Thereupon, plaintiff took the precaution to write to the secretary of state January 13, 1926, to ascertain whether an application had been made for the incorporation of the Central Paper Company, and received a reply to the effect that there had not. He showed the letter to defendant who again assured him that he would inform Danehy whenever he incorporated. Thereafter plaintiff by way of precaution billed its goods to defendant as "Central Paper Co. (Not Inc.)," including the merchandise sued for. The words "Not Incorporated" were on each bill. Danehy testified he never had any notice that a charter of incorporation was taken out until he received notice of such a defense to this claim, and that he had no conversation subsequently with Gazley about it.

Gazley admitted doing business under the name "Central Paper Co." until it was incorporated in January, 1926. He claimed, but Danehy denied, that the incorporation papers were taken out on the suggestion of Danehy. He admitted that he received bills from plaintiff addressed to his company as not incorporated. He claimed that in March, 1926, Danehy complained of his incorporating the company and taking from plaintiff its employes, and at that time borrowed $2,000 to settle up his account with plaintiff. Danehy denied having any such conversation and testified that the $2,000 was paid in October, 1926. Gazley admitted using stationery and bills designating his company as "Central Paper Co. (Not Inc.)," and identified statements of account on his billheads so reading which he had transmitted to plaintiff with checks for the account. He said he made the change

in that money that is the latter part of 1970 [illegible] with an
[illegible] he would incorporate and get money into the necessary [illegible]
Hanoby had several conversations with him later as to whether "he
had incorporated" and was informed by Hanoby that he did not, but
would before Hanoby [illegible] on his [illegible]. Thereupon, plaintiff [illegible]
the presentation to write in the secretary of state [illegible] in 1971,
to a certain [illegible] on application had been made for the incorporation
of the "Central Paper Company", and received a reply to the
effect that there had not. He asked the latter to determine [illegible]
again ensured him that he would [illegible] whatever he incorporated.
Thereafter plaintiff by way of [illegible] filled the [illegible] to
defendant of "Central Paper Co. (Not Inc.)," including the [illegible]
used for. The words "Not Incorporated" were [illegible] with.
[illegible] be never had any notice that a charter of incorporation
was taken out until he received notice of such a [illegible] in [illegible]
claim, and that he had no [illegible] with [illegible]

Hanoby admitted doing business under the name "Central Paper
Co." until it was incorporated in January, 1972. He admitted, but
Hanoby denied, that the incorporation papers were taken out on the
suggestion of Hanoby. He admitted that he received "[illegible] from plain-
tiff addressed to his company as not incorporated. He claimed that
in March, 1972, Hanoby complained of his incorporating the company
and taking from plaintiff its employee, and at that time borrowed
$2,000 to settle up his account with plaintiff. Hanoby denied having
any such conversation and testified that [illegible] was paid in January,
1972. Hanoby admitted using stationery and bills [illegible] his
company as "Central Paper Co. (Not Inc.)," and identified [illegible]
of account on his bill-heads as [illegible] he [illegible] to
plaintiff with checks for the accounts. He said he [illegible] the [illegible]

leaving out the words "Not Inc." in June, 1926, but identified statements of account in his own handwriting, sent to plaintiff on the unchanged form as late as January 7, 1927. He was unable to produce his checks, claiming he had placed them in a warehouse in September, 1927, that was burned in February, 1928. The suit was begun August 12, 1927, yet he did not thereafter look for the checks and never took them to his lawyer. It did not appear that he ever sent either checks or statements to plaintiff not containing the words "Not Inc." Acknowledging a letter from plaintiff as late as July 14, 1927, Gazley used letter paper designating the company as not incorporated. In rebuttal Lenehy again testified that Gazley never informed him that he had his company incorporated and defendant's checks were signed "Central Paper Co.," with his own name underneath.

We think the contention made that the verdict of the jury was manifestly against the weight of the evidence is well taken, and that the judgment should be reversed on that ground and a new trial had.

Complaint is made of the refusal of an instruction submitted by plaintiff as to the burden of proof, and an instruction given at defendant's request as to the preponderance of the evidence. We deem it unnecessary to discuss them as the questions they present are not likely to arise again.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

leaving out the word "Not Inc." in that, but nevertheless statements of account in his own handwriting, sent to plaintiff on the usechanged form as late as January 7, 1927. In the months to produce his checks, claiming he had placed them in a safe-deposit in September, 1927, that one issued in February, 1928. The suit was begun August 12, 1927, yet he did not show-after look for the checks and never then came to his lawyer. In his and wife's that he ever took either checks or statements to plaintiff and containing the words "Not Inc." acknowledging a letter from plaintiff as late as July 14, 1927. Dating back letter page containing the company as not incorporated. In Martin's testimony again claim that Dailey never informed him that he had his company incorporated and defendant's checks were signed "General Paper Co.," with the same understanding.

We think the conclusion made that the verdict of the jury was manifestly against the weight of the evidence is well taken, and that the judgment should be reversed on that ground and a new trial had.

Complaint is made of the refusal of the instruction submitted by plaintiff as to the burden of proof, and an instruction given at defendant's request as to the preponderance of the evidence. In view of the necessity to discuss them on the problem they present are not likely to arise again.

[illegible] are reversed.

Brinkley, C. J., and Jonathan, J., concur.

33022

226

ROCK RAPIDS CREAMERY COMPANY,
a corporation, for the use of
ALEX GETZ,
Defendant in Error,

v.

THE NEW YORK CENTRAL RAILROAD
COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

252 I.A. 656

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Alex Getz obtained a judgment in the Municipal Court of Chicago against Rock Rapids Creamery Company, a corporation, for $1,200, and, having had execution issued thereon and returned unsatisfied, sued out a writ of garnishment and caused the New York Central Railroad Company, a corporation, to be summoned as garnishee. Interrogatories were propounded to the said garnishee and it answered that it was not indebted to the said Creamery Company; that it had no moneys, choses in action, credits, or effects owned by the Creamery Company; that it had no lands, etc., of the Creamery Company, and that it had no property, goods, etc., of any kind belonging to it. The garnishee further answered that the Creamery Company had filed two claims with the receivers of the Chicago, Milwaukee & St. Paul Railway Company for damages alleged to have been sustained on two shipments of live poultry consigned from Doonsocket, South Dakota, to New York City via the lines of the Chicago, Milwaukee & St. Paul Railway Company; that the Chicago, Milwaukee & St. Paul Railway Company was the initial carrier and that the said garnishee delivered both shipments to their ultimate consignees; that said claims are for damages that cannot be ascertained by computation; that said claims are unliquidated and are, therefore, claims or choses in action which are not subject to attach-

ment or garnishment proceedings; that the said garnishee is not liable to the Creamery Company and that whatever claim said Company may have is against the Chicago, Milwaukee & St. Paul Railway Company; that the Creamery Company has not filed any claims with the garnishee; "wherefore, the garnishee prays that said garnishment proceedings against it may be dismissed." The beneficial plaintiff filed no replication to the answer of the garnishee, although the case was apparently tried as though a formal issue had been raised. No briefs have been filed by the beneficial plaintiff in this court.

On the hearing the beneficial plaintiff called as his sole witness his traffic manager, George K. Hazzan. This witness testified that he learned from "car men" or "car takers" that the cars containing the poultry were in an accident while in the possession of the garnishee; that he learned from officers of the garnishee that claims for damages had been filed by the Creamery Company with the Chicago, Milwaukee & St. Paul Railway Company; that one claim was for "$500 to $502, and the other claim $208.14;" that he had examined a letter from the garnishee to the freight claim agent of the Chicago, Milwaukee & St. Paul Railway Company under date of February 27, 1926. This letter was introduced in evidence by the beneficial plaintiff, over the objection of the garnishee. It is signed in typewriting, "John K. Lovell, Asst. Freight Claim Agent," of The New York Central Railroad Company, and it is addressed to the freight claim agent of the Chicago, Milwaukee & St. Paul Railway Company. The letter states that the two cars containing the poultry in question received a severe jolt near Grissey, Ohio; that a sudden stop was made at Holland, Ohio; that another sudden stop was made at East Buffalo, and that as a result some damage was done to the poultry; that the claims filed by the Chicago, Milwaukee & St. Paul Railway

ment or guaranteed proceeds since that the said grantees do not
liable to the Treasury Department and that whatever claim said Company
may have in against the Indians, although it is, that Railway Company
that the Treasury Department did not file any claim with the grantees;
"wherefore, the grantees pray that said grantees proceedings
Against it may be dismissed." The beneficial plaintiff filed no
replication to the answer of the grantees, although the case was
apparently tried as though a formal issue had been joined. No
briefs have been filed by the beneficial plaintiff in this case.

On the trial the beneficial plaintiff called as his
sole witness his traffic manager, Henry T. Loewen. This witness
testified that he learned from "our agent" or "our broker" that the
ores containing the precious metal in question which in the aggregate
of the grantees; that he learned from officers of the grantees
that claims for damages had been filed by the Treasury Department with
the Chicago, Milwaukee & St. Paul Railway Company; that one claim
was for "$[illegible] to [illegible]", and the other claim "[illegible]" that he had
examined a letter from the grantees to the freight claim agent of
the Chicago, Milwaukee & St. Paul Railway Company under date of
February 27, 1926. This letter was introduced in evidence by the
beneficial plaintiff, over the objection of the grantees. It is
signed in typewriting, "John K. Lovell, Jr., Freight Claim Agent,"
of the New York Central Railroad Company, and it is addressed to
the freight claim agent of the Chicago, Milwaukee & St. Paul Railway
Company. The letter states that the ore was consigning the Railway
in question received a severe jolt near Albany, Ohio; that a unknown
step was made at Holland, Ohio; that crushed broken rock was used as
dust buffalo, and that as a result some damage occurred to the quantity
that the claims filed by the Chicago, Milwaukee & St. Paul Railway

Company against the garnishee growing out of the damages to the poultry "appear excessive, hence evidently should be reduced." Wassan further testified that he talked with the district claim agent and the general agent of the garnishee about the said claims; that one of them said he was "going right to the St. Paul and tell them that the liability was with the New York Central, and that they admitted the liability; * * * that they did not admit liability in any amount; * * * that they did not promise to pay anything on the claims; that neither of the two officials promised to pay anything on the claims * * * the New York Central couldn't owe the Creamery Company; the St. Paul is the settling carrier, and the New York Central couldn't pay." The garnishee objected to practically all of the testimony of Wassan given on the direct, and here strenuously contends that its motion to strike from the record his testimony should have been sustained by the trial court. At the conclusion of Wassan's testimony the garnishee moved the court to discharge it as garnishee upon the grounds: "1. The New York Central Railroad Company was not the initial carrier; that no claim had been filed by the Rock Rapids Creamery Company against the New York Central Railroad Company but had been filed with the receivers of the Chicago, Milwaukee & St. Paul Railway Company, the initial carrier. 2. The claim of the Rock Rapids Creamery Company was for unliquidated damages and was therefore not subject to garnishment." The court overruled this motion and found that the garnishee was indebted to the Rock Rapids Creamery Company in the sum of $651.92 and entered judgment in favor of the Rock Rapids Creamery Company, for the use of Alex Getz, against the garnishee for that amount. The garnishee, The New York Central Railroad Company, prosecutes this writ of error.

The garnishee raises a number of contentions in this court,

Company against the machines are long yet, or but dismissed in the primary "appeal successive, bonus crimesbly cannot be evidence." Reason further testified that he talked with the industrial claims agent and the general agent of the machines about the [illegible] that one of them told me was taking right to the [illegible] and that the identity was also the same machine. [illegible] admitted the identity [illegible] they did not admit identity in any answer [illegible] that they did not promise to pay anything on the claims [illegible] the Sioux Iron Company's [illegible] company; she [illegible] the Sioux Central company's pay." The machine objected to practically all of the testimony of Reason given on his direct, and upon vigorously cross-[illegible] the motion to strike from [illegible] should have been sustained by the trial court. [illegible] testimony the [illegible] upon the ground: "1. The Iron Iron Central Company was not the initial carrier [illegible] Angles Iron Company [illegible] but had been filed with the [illegible] Industrial Company, the initial carrier. 4. The claim of the Rock Island Company [illegible] the [illegible] motion and found that the [illegible] Company in the case of the Rock Island Company, [illegible] the machines for that account. [illegible] National Company, [illegible]

The governing [illegible] court,

but it is necessary to refer to only one. The garnishee contends that "plaintiff's evidence, construed most favorably to it, only established that the judgment debtor had an unliquidated claim against the garnishee - such species of claim cannot be reached by garnishment." This contention is clearly a meritorious one. Unliquidated damages are not liable to garnishment. They are not a debt within the meaning of the statute relating to garnishment. (Capes v. Burgess, 135 Ill. 61.) If it were necessary, other cases to the same effect might be cited.

The court erred in overruling the motion of the garnishee to be discharged as garnishee, and the judgment of the Municipal Court of Chicago is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

but it is necessary to refer to only one. The jury's verdict that plaintiff's evidence, considered most favorably to it, only established that the defendant driver had no unlimited claim against the guarantors - such claims of which could be released by guarantors. This conclusion is clearly a misinterpretation. Unlimited damages are not liable to guarantors. They are not a debt within the meaning of the statute relating to guarantors. (Cooper v. Bartlett, 105 Ill. App. 2d.) If it were necessary, this cases to the same effect might be cited.

The court erred in overruling the motion of the guarantors to be discharged as guarantors, and the judgment of the municipal court of Chicago is reversed.

REVERSED.

Gridley, P. J., and Barrett, J., concur.

33061

JOSEPH HOUDEK,
Appellee,
v.
JOHN STURZ,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

252 I.A. 657

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, Joseph Houdek, plaintiff, sued John Sturz, defendant, in an action of trespass on the case for malicious prosecution. There was a trial before the court with a jury and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at $1,250. Judgment was entered on the verdict and this appeal followed.

The defendant first contends that the evidence shows that the defendant had probable cause to believe that the plaintiff had committed the offense of larceny as bailee, and therefore the judgment should be reversed. The plaintiff has been employed by the Cuneo Corporation for many years. He owns his home, where he lives with his wife and two children. The defendant, was engaged in the business of selling new and used automobiles under the name of S. & S. Motor Sales Company. He was well acquainted with the plaintiff and knew that he was the owner of real estate. On May 27, 1926, the plaintiff purchased from the defendant a Gardner roadster at a price of $2,300, and as part payment for the same the plaintiff gave a note and chattel mortgage to the Handley Finance Company for $1,380. On February 15, 1927, the plaintiff and the defendant entered into a written contract whereby the defendant proposed to

In the Superior Court of Cook County, Sample Division,

plaintiff, John Doe, defendant. In an action of trespass on the case for malicious prosecution. Trial was a total before the court with a jury and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at $1,100. Judgment was entered on the verdict and this appeal taken.

The defendant first contends that the evidence shows that the defendant had probable cause to believe that the plaintiff had committed the offense of larceny as belief, and therefore the judgment should be reversed. The plaintiff has been employed by the Chase Corporation for many years. He owns his home, where he lives with his wife and two children. The defendant, who engages in the business of selling new and used automobiles under the name of "A. B. Motor Sales Company", is not well acquainted with the plaintiff and knew that he owner of real estate. On May 27, 1960, the plaintiff purchased from the defendant a Chevrolet convertible at a price of $1,900, and as just payment for the same the plaintiff gave a note and chattel mortgage to the Security Finance Company for $1,100. On February 17, 1961, the plaintiff and the defendant entered into a written contract whereby the defendant returned to

furnish the plaintiff one Gardner sedan at a price of $2,445, on which amount there was to be credited an allowance of $1,000 for the Gardner roadster. The balance, $1,445, was to become due when the Gardner sedan was delivered to the plaintiff. The defendant also agreed to pay the balance then due on the mortgage on the Gardner roadster, $800. The proposal was accepted by the plaintiff. On the reverse side of the paper that contains the proposal and acceptance is a "Bill of Sale," signed by the plaintiff, which sets forth that the plaintiff is the owner of the Gardner roadster and also contains these provisions:

> "I will deliver the above car to you at time of delivery of new _____car on _____192_ and will accept according to conditions of the contract I have signed, and to which this Bill of Sale is made a part thereof.
> * * *
>
> "I hereby transfer, sell, set over and assign all my right, title, claim and interest in and to the automobile above described to S. & S. Motor Sales Company, their heirs, administrators or assigns forever, in consideration of S. & S. Motor Sales Company allowing me a credit of $_____ as specified herein on the contract (to which this Bill of Sale is a part thereof) for a new _____car as specified in said contract."

The contract and bill of sale were drawn on a printed form furnished by the defendant, and were signed in the office of the defendant at the same time. Prior to the above transaction, the defendant had had in his possession the Gardner roadster for the sole purpose of selling it for the plaintiff. On February 22, 1927, the defendant informed the plaintiff that he had sold the Gardner roadster and had received in part payment a Rickenbacker car. The defendant testified that he also received $450 in cash on the trade. The plaintiff testified that the defendant told him that he received $800 in cash on the trade, and it would appear, from a paper signed by the defendant, that he actually received that amount in cash. The plaintiff further testified that the defendant showed him the

Therefore the plaintiff was [illegible] [illegible] a price of $[illegible], on which amount there was to be credited as allowance of $[illegible] for the [illegible] trade-in. The balance, $[illegible], was to [illegible] the [illegible] the further sum was delivered to the plaintiff. The defendant also agreed to pay the balance due on the mortgage on the further vehicle, $[illegible]. The proposal was accepted by the plaintiff. In the reverse side of the paper that contains the proposal and acceptance is a "Bill of Sale" signed by the plaintiff, which sets forth that the plaintiff is the owner of the further vehicle and also contains these provisions:

> "I will deliver the above car to you at time of delivery of new _____ and as _____ [illegible] will according to condition of the contract I have signed, and to which this bill of sale is made a part thereof.
>
> * * *
>
> "I hereby warrant, sell, and that we [illegible] all my right, title, claim and interest in and to the vehicle above described to [illegible] Motor Sales Company, free and unencumbered in a manner [illegible] [illegible] [illegible] as specified herein in the contract (in which this bill of sale is a part thereof) for a new _____ car in condition as will warrant."

The dealership and bill of sale were drawn on a printed form [illegible] by the defendant, and were signed in the office of the defendant at the same time. Prior to the [illegible], the plaintiff had had in his possession the further vehicle for the sole purpose of selling it for the plaintiff. On [illegible], the defendant informed the plaintiff that he had sold the further vehicle and had received in part payment a [illegible]. The defendant testified that he also received $[illegible] in cash on the trade. The plaintiff testified that the defendant told him he received $[illegible] in cash on the trade, and it would appear, from a copy placed by the defendant, that he actually received [illegible]. The plaintiff further testified that the defendant [illegible]

Rickenbacker car and said to him: "I will have the machine cleaned up and polished up, and if you like it take it out and try it, and I will give you a clear bill of sale for $1,000 on the Rickenbacker, and everything will be settled up;" that the next day the defendant gave him the car and told him to ride around and see if he liked it; that about two and a half hours later he drove back to the defendant's garage but there was no one there but the night watchman; that the next day he went to the defendant's garage "to get a receipt on that Rickenbacker so that everything should be cleared up, and Mr. Sturz refused to give a receipt on the Rickenbacker, and a clear bill of sale, and refused to place the $1,000 on the Gardner sedan;" that some days later the defendant, at his place of business, told the plaintiff that if he did not bring the Rickenbacker car back he would have him arrested, to which the plaintiff responded that the defendant "should either give a clear bill of sale on it as he promised or place $1,000 down on the Gardner sedan or give me my papers back for the roadster, which he refused to do." The plaintiff further testified that he never received from the defendant anything of value for the Gardner roadster or the Gardner sedan "outside of this Rickenbacker car." The defendant testified that he told the plaintiff to try the Rickenbacker car and if he liked it the defendant would give him a bill of sale for the same, provided the plaintiff gave him a chattel mortgage on the car for $750, and that when the chattel mortgage was given the defendant would pay the $800 balance due on the chattel mortgage on the Gardner roadster, and that the plaintiff agreed to this proposition and promised that he would bring the car back after he had tried it out. The defendant admitted that he did not give the plaintiff the Gardner sedan and that "outside of the Rickenbacker that he has taken" the plaintiff has never received anything from the

Hickenbotter car and said to him: "I'll have the mechanic checked up and polished up, and if you like it when you see it, and I will give you a clear bill of sale for it, or the Hickenbotter, and everything will be settled up." Next the next day the defendant gave him the car and told him to take it home and see if he liked it; that about two and a half hours later he came back to the defendant's garage and there was no car there but the plaintiff said the next day he went to the defendant's garage to get a receipt for that Hickenbotter so that everything should be cleared up, and the defendant refused to give a receipt on the Hickenbotter, and a clear bill of sale, and refused to place the Hickenbotter on the defendant's car; that upon being leaving the defendant, as his place of business, told the plaintiff that if he did not bring the Hickenbotter car back he would have him arrested, to which the plaintiff replied that the defendant "should either give a clear bill of sale as it was required or place $1,000 down on the Hickenbotter being or give up my deposit and the receiver, which he refused to do." The plaintiff testified that the deposit be never received from the defendant anything of value for the Hickenbotter receiver or the Hickenbotter car. The defendant testified that the plaintiff at the time the Hickenbotter car was it to bring it the defendant said, "The a bill of sale for the car, providing the plaintiff was to a chattel mortgage on the car for $750, and that when the chattel mortgage was given the defendant would pay the four months note on the chattel mortgage on the Hickenbotter receiver, and that the plaintiff agreed to this proposition and promised that he would bring the car back if he had trouble in it. The defendant testified that he did not give the plaintiff the Hickenbotter back and that "plaintiff of the Hickenbotter was he had taken." The plaintiff has never received anything from the

defendant for the Gardner roadster. The defendant further testified that when he traded the Gardner roadster for the Rickenbacker the value of the latter was placed at $1,000. In a paper signed by the defendant he "allowed" to the plaintiff $1,800 for the Gardner roadster. On February 26, 1927, in the Municipal Court of Chicago, the defendant swore to a complaint charging the plaintiff with larceny as bailee of the Rickenbacker car. Upon this complaint a warrant was issued and the plaintiff was arrested at 9:30 a. m. at his place of employment, and he was held in confinement in the station house until 11:30 a. m. the following day. Upon a hearing he was found not guilty and discharged, and no further proceedings touching the alleged larceny were taken against him. The plaintiff paid counsel, for representing him in the Municipal Court, $250. The jury believed the theory of fact of the plaintiff, and we are satisfied that they were justified in so doing. We certainly cannot say from the record that their finding was against the manifest weight of the evidence. Probable cause "is a belief held in good faith by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the particular offense charged." (Glenn v. Lawrence, 280 Ill. 581, 587.) Under the plaintiff's theory of fact the defendant had not probable cause to believe that the plaintiff had committed the offense of larceny as bailee.

The defendant next contends that the plaintiff did not prove that the defendant was actuated by malice. It is a sufficient answer to this contention to say that if the criminal prosecution is shown to be without reasonable or probable cause the jury may infer malice. (Krug v. Zard, 77 Ill. 603; Thompson v. Force, 65 Ill. 370;

defendant for the further recovery. The defendant further contends that then he traded the Buick car back for the $1,000 allowance the value of the latter was placed at $1,000. In a prior action by the defendant he "alleged" to the plaintiff $1,000 for the earlier recovery. On February 24, 1977, in the municipal court of Chicago, the defendant sued, to a complaint alleging the plaintiff with larceny as bailee of the Buick automobile car. Upon this complaint a warrant was issued and the plaintiff was arrested at 5:00 p. m. at his place of employment, and he was held in confinement in the station house until 11:30 a. m. the following day. Upon a hearing he was found not guilty and discharged, and no further proceedings touching the alleged larceny were taken against him. The plaintiff paid counsel, for representing him in the municipal court, $150. The jury believed the theory of fact of the plaintiff, and we are satisfied that they were justified in so doing. We reluctantly extract from the record that their finding was against the manifest weight of the evidence. Probable cause "is a belief held in good faith by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the criminal offense charged." (Hurd v. Lawrence, 280 Ill. 581, 587.) Under the plaintiff's theory of fact the defendant had not probable cause to believe that the plaintiff had committed the offense of larceny as bailee.

The defendant next contends that the plaintiff did not prove that the defendant was actuated by malice. It is a rudimentary answer to this contention to say that if the criminal prosecution is shown to be without reasonable or probable cause the jury may infer malice. (Ling v. Jaud, 77 Ill. 603; Thompson v. Davis, 38 Ill. 403;

Roy v. Goings, 112 Ill. 656; Daily v. Donath, 100 Ill. App. 52.) Moreover, there is evidence tending to show that the defendant was using the criminal laws for unjust and oppressive uses for his private gain and advantage. We refer to this evidence in passing upon the next contention.

The defendant next contends that he consulted a competent legal counsel in good faith to ascertain what course to pursue in reference to the acts done by plaintiff, and that such counsel advised him that there was probable cause for a criminal prosecution and that he acted upon such advice, and that such advice constitutes a complete defense to the plaintiff's suit. Before a defendant can shield himself by the advice of counsel, it must appear from the evidence that he made in good faith a full, fair and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff, which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care, have obtained, to a respectable attorney in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against the plaintiff. (Roy v. Goings, supra, 663-4; Froemke v. Massman, 215 Ill. App. 86, 89-90.) In the present case it is apparent from the testimony of the attorney who was consulted by the defendant, over the telephone, that the defendant did not make to him a full, fair and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff, which were within the knowledge of the defendant. Moreover, the defendant admitted that prior to the commencement of the criminal proceedings, by advice of the same attorney, he told the plaintiff that if he did not come in and sign the mortgage or bring the car back, he would have him arrested. It is not disputed in the evidence that just prior to the commencement of the hearing in the Municipal

[illegible] v. [illegible], 127 [illegible] 2d [illegible] v. [illegible], 100 [illegible] (1[illegible]). However, there is no [illegible] to show that his counsel was making the criminal [illegible] for delay and procrastination when the [illegible] plain and [illegible]. In order to [illegible] evidence in [illegible] upon the [illegible] conditions.

The defendant [illegible] in [illegible] a [illegible] legal counsel in good faith in [illegible] [illegible] reference to the [illegible] by plaintiff, and [illegible] [illegible] him that there was probable cause for a criminal prosecution and that he acted upon such advice, and [illegible] [illegible] defense to the plaintiff's suit. Failure to [illegible] [illegible] proof by the advice of counsel, it must appear from the evidence that he made in good faith a full, fair and honest statement of all the material circumstances bearing upon the reputed guilt of the plaintiff, which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care, have obtained, to a responsible attorney in good standing, and that the defendant in good faith acted upon the advice of such attorney in instituting and carrying on the prosecution against the plaintiff. (See T. Pelham [illegible], 888-42; Ferrell v. [illegible], 112 [illegible], [illegible], 88-90.) In the present case it is apparent from the testimony of the witnesses who was examined by the defendant, and the [illegible], that the defendant did not make to him a full, fair and honest statement of all the material circumstances bearing upon the reputed guilt of the plaintiff, which were within the knowledge of the defendant. Moreover, the defendant admitted that prior to the commencement of the criminal proceedings, by advice of his own attorney, he told the plaintiff that if he did not come in and clear the mortgage or raise the money, he would have him arrested. It is not disputed in the evidence that just prior to the commencement of the hearing in the municipal

Court the same attorney approached the plaintiff and stated to him that they wanted the car and that the plaintiff should give it to them. "If the criminal prosecution against appellee was instituted for the mere purpose of coercing him into payment of a debt, or the surrender of some right claimed, and not in the interest of public justice, or to vindicate the law and punish crime, and was falsely made, the fact that he procured the advice of counsel will not shield him from the consequences of his wrongful act, done, not in good faith upon such advice, but with the sinister motive of personal gain. * * * If counsel is sought simply for protection against indulging his malice, or to enable him to use the criminal laws for unjust and oppressive uses for his private gain and advantage, it will afford no defense to the party causing the arrest, 'but will be rather an element of increased damages.' Boss v. Innis, 26 Ill. 259." (Neufeld v. Rodeminski, 144 Ill. 83, 88-9.)

The defendant has had a fair and impartial trial, and the judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] the defendant contended the plaintiff was at fault in
[illegible] that they muddied the car and that the plaintiff should pay
[illegible] it be done. "If the defendant proximately caused the
[illegible] instituted for the very purpose of correcting the [illegible] of a
[illegible]ably, or the suspension of some right claimed, and not in the nature of
[illegible] of public function, or by [illegible] the law and public [illegible]
[illegible] family home, the fact that an [illegible] of [illegible]
will not shield him from the consequences of his [illegible]. [illegible]
not in good faith upon [illegible], but [illegible] motive of
personal gain. [illegible] If [illegible] is [illegible] simply for protection
against injuring his neighbor, or to enable him to use his [illegible]
laws for unjust and oppressive ends for his private gain and aggrandizement, it will afford no defense in the [illegible] [illegible]
'but will be rather an [illegible] of [illegible] damage." [illegible] v. [illegible],
[illegible] 139." [illegible] v. [illegible], [illegible] [illegible].

The defendant has [illegible] fair [illegible] [illegible]
his judgment of the [illegible] [illegible] [illegible] [illegible] [illegible]
is affirmed.

[illegible]

[illegible], P. J., and [illegible], J., concur.

33182

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN WACH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Wach, plaintiff in error, was charged, in an information filed in the Municipal Court of Chicago, June 21, 1928, with having in his possession lewd, wicked, scandalous and obscene pictures. He pleaded guilty to the charge and then made an application for probation, which was allowed, and he was placed on probation for six months and the cause was continued to January 10, 1929. On September 10, 1928, a probation officer made a written report to the court in which he stated that the plaintiff in error had violated his probation in that he had left the state without permission and continued to circulate obscene literature, and the officer asked that the probation be revoked and a warrant issue for the arrest of the plaintiff in error. Thereupon an order was entered that a warrant issue, and the plaintiff in error was rearrested. On September 19, 1928, the cause came on for hearing and the court found that the plaintiff in error had violated his probation by leaving the State of Illinois without permission of the court. Counsel for the plaintiff in error thereupon moved for a new trial, which was denied, and then moved for an arrest of judgment, which was denied, and the plaintiff in error was then sentenced to the House of Correction for a period of sixty days and to pay a fine in the sum of $25. This writ of

[illegible]

THE [illegible] OF ILLINOIS,

[illegible] defendant in error.

[illegible]

[illegible] ACH.

Plaintiff in error.

Mr. [illegible] delivered the opinion of the court:

John Fuck, plaintiff in error, was charged, in an information filed in the municipal court of Chicago, June 21, 1928, with having in his possession lewd, wicked, immoral and obscene pictures. He pleaded guilty to the charge and then made an application for probation, which was allowed, and he was placed on probation for six months and the order was continued to January 10, 1929. On September 24, 1929, a probation officer made a written report to the court in which he stated that the plaintiff in error had violated his probation in that he had left the state without permission and continued to distribute obscene literature, and the officer asked that the probation be revoked and a warrant issue for the arrest of the plaintiff in error. Thereupon an order was entered that a warrant issue, and the plaintiff in error was rearrested. On September 13, 1929, the cause came on for hearing and the court found that the plaintiff in error had violated his probation by leaving the jurisdiction without permission of the court. Counsel for the plaintiff in error thereupon moved for a new trial, which was denied, and then moved for an arrest of judgment, which was denied, and the plaintiff in error was then sentenced to the House of Correction for a period of sixty days and to pay a fine in the sum of $[illegible]. This writ of

error followed. Nothing but the common law record is before us.

The plaintiff in error contends that the information charged that the alleged act was committed on an impossible date. The People, by leave of court, have filed an additional transcript of the record, and from this it appears that the information charged the offense to have been committed "on the 20th day of June, A. D. 1928," and there is therefore no merit in the instant contention.

The plaintiff in error next contends that the information was so defective as to be void. The information charges that the defendant, on June 20, 1928, in Chicago, Illinois, "did then and there unlawfully, wickedly, maliciously and scandalously have in his possession a certain lewd, wicked, scandalous and obscene picture to the manifest corruption of public morals, in contempt of the People and the law, to the evil example of all persons," in violation of the statute, etc. Plaintiff in error contends that the only picture mentioned in the statute is a "stereoscopic picture," and that the information is fatally defective because it fails to allege that the picture that the plaintiff in error is charged with having in his possession was a stereoscopic picture. Paragraph 455, section 223, of the Criminal Code (Cahill's Ill. Rev. St. (1927), p. 923) provides a penalty for "Whoever * * * have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture * * * or article of indecent or immoral use, * * * shall be confined in the county jail,' etc. The Century dictionary defines "photograph" as "a picture produced by any process of photography." "Picture" is the word commonly used for "photograph." Paragraph 740, section 6, of the Criminal Code provides that an indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature

error followed. Thinking that the counsel for the defendant is going to argue,

The plaintiff in error contends that the information charged that the alleged act was committed on or about the 20th day of June, 1920. The Judge, by leave of court, then filed an additional information charging that the defendant did on or about the 20th day of June, 1920," and then in the information he sets forth the offense in more than one count. The counsel for the defendant in error then contended that the information was so defective as to be void. The information charges that the defendant, on June 20, 1920, in Tuscaloosa County, Ala. when and there unlawfully, wilfully, maliciously and knowingly been in his possession a certain lewd, vicious, immoral and obscene writing to the manifest corruption of public morals, to the injury of the People and the law, in the evil example of all examples." In violation of the statute, etc. Plaintiff in error contends that the only picture mentioned in the charge is a "photographic picture," and that the information is fatally defective because it fails to allege that the picture that the plaintiff in error is charged with having in his possession was a pornographic picture. Section 4, article XII, of the Alabama Code (Martin's Ill. Sen. Ch. (1907), p. 344) provides a penalty for "whoever * * * has in his possession, with or without intent to sell or give away, any figures and indecent book, pamphlet, paper, drawing, lithograph, engraving, photograph, photogravure, photogravure, stereoscopic picture * * * or article of immoral use or immoral use, * * * shall be confined in the county jail," etc. The common dictionary defines "photograph" as "a picture produced by the process of photography." "Picture" is the more commonly used for "photograph." Paragraph 140, section 6, of the criminal code provides that an indictment shall be deemed sufficiently descriptive and correct which states the offense in the words and language of the statutes creating the offense, or so plainly that the nature

of the offense may be easily understood by the jury, and as the same rule applies to an information it would seem clear that the information in question stated the offense so plainly that it could easily be understood by the plaintiff in error and by the court. The record shows that the plaintiff in error at the time he pleaded guilty and at the time of the hearing of the application to have the probation revoked, was represented by counsel. There was no motion to quash and no motion for a bill of particulars. There is no merit in the instant contention.

The plaintiff in error next contends that the court was without jurisdiction to rearrest him on the petition filed by the probation officer. The petition recites that the signer of the same was a duly qualified probation officer, and it is signed "Joseph Rogers, Probation Officer. Per M. A. D.," and the plaintiff in error argues that a probation officer cannot delegate his official power to any person, and that therefore the proceedings based upon the application and the warrant were unauthorized by the statute and void. It is a sufficient answer to this contention to say that paragraph 816, section 6, of the Criminal Code provides that "at any time during the period of probation, the court may, upon report by a probation officer <u>or other satisfactory proof</u> of the violation by the probationer of any of the conditions of his probation, revoke and terminate the same and issue a warrant for the arrest of the probationer," etc. The order of the court recites that "from the proofs submitted in this cause that there is probable cause for believing that the defendant herein has violated the conditions of the probation of said defendant, it is ordered that a warrant issue," etc. The statute is in the disjunctive, and it would appear in this case that the court did not act alone upon the application of the probation officer, but required proof before issuing an order for the warrant. Moreover, the statute does

of the offense may be easily overlooked by the jury, and by the same rule applied in an information it would seem clear that the information in question alleged the offense so plainly that it would easily be understood by the plaintiff in error and by the court. The record shows that the plaintiff in error by his counsel in the original suit and in the time of the hearing of the application in habeas corpus raised, and represented by counsel. There was no motion to quash and no motion for a bill of particulars. There is no merit in the instant contention.

The plaintiff in error says, moreover, that the court had without jurisdiction to arraign him on the petition filed by the prosecuting officer. The petition recites that the charges of the grand jury are a duly qualified prosecuting officer, and it is signed "Joseph Rogers, Prosecuting Officer." But it is, of course, and the plaintiff in error argues that a prosecuting attorney cannot delegate his official power to any person, and that therefore the proceedings based upon the application are the nullities and should be quashed by the district court. It is a sufficient answer to this contention to say that paragraph 816, section 8, of the Compiled Laws provides that "at any time during the period of probation, the court may issue warrants to a probation officer or other peace officer" or the defendant to the proceedings of any of the conditions of his probation, revoke and terminate the same and issue a warrant for the arrest of the probationer, etc. The order of the court recites that "upon the proper application in this cause that there is probable cause for believing that the defendant herein has violated the conditions of the probation of said defendant, it is ordered that a warrant issue," etc. The statute is not the "disjunctive" and it would appear in this case that the court did not act alone upon the application of the prosecuting officer, but certainly proof before issuing an order for the defendant. Moreover, the statute does

not seem to require that the report of the probation officer be signed, or even that it be in writing. There is no merit in the present contention.

The plaintiff in error next contends "that the court was without power or jurisdiction to sentence the defendant to confinement in the Houseof Correction at hard labor for 60 days and fine him in the sum of $25 nor any other sum." Paragraph 455, section 223, of the Criminal Code provides that a defendant found guilty "shall be confined in the county jail not more than six months or be fined not less than $100 nor more than $1,000 for each offense." Counsel for The People concede that the court, under the statute, could not impose both a fine and imprisonment, but they contend that in the present case there should be "a reversal and remandment with instructions to enter the proper judgment." This contention of The People is a meritorious one. (See Wallace v. The People, 159 Ill. 446, 464; The People v. Boer, 262 Ill. 152, 157.)

The judgment of the Municipal Court of Chicago is reversed, and the cause is remanded with leave to the State's Attorney of Cook County, on behalf of The People, to move the court for the entry of a proper judgment of sentence upon the plea of guilty, and with directions to the court to allow such motion and resentence the defendant, John Wach (plaintiff in error.)

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

not seem to require that the report of the municipal officers be signed, or even that it be in writing. There is no merit in the present contention.

The plaintiff in error then contended that the town has without power or jurisdiction to maintain the information to recover in the Municipal Corporation a fund labor for 20 days and five days in the sum of $32 was not clear enough." Although not, section 2[illegible], of the Criminal Code provides that a conviction cannot quashed unless it be contained in the county jail not more than ten months or in three months less than $100 nor more than $1,000 for each offense." Because the people remark about the county, under the statute, could not impose a fine and imprisonment, but they evidence that in the present case there should be "a reversal and remanding with instructions to enter the proper judgment." This contention of the trial is a meritorious one. (See Delaney v. The People, 110 Ill. 100, 48; Chicago v. Post, 110 Ill. 252, 257.)

The judgment of the municipal court of [illegible] is reversed, and the cause is remanded with leave to the [illegible] attorney of the county, on behalf of the people, to move the court for the entry of a proper judgment of conviction upon the plea of guilty, and the [illegible] to the court to allow such motion [illegible] such (plaintiff in error).

REVERSED AND REMANDED.

Gridley, J., J., and Barnes, J., concur.

33199

FOREMAN TRUST & SAVINGS BANK,
administrator of the estate
of Lucille Karbowski,
Plaintiff,

v.

ALBERT VALKIMA et al.,
Defendants - Appellees.

On appeal of SMITH-LAWSON-COAMBS
COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

252 I.A. 657

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT:

Smith-Lawson-Coambs Company, appellant, seeks to reverse a judgment entered against it in the Superior Court of Cook County for $4,377.48 in a garnishment proceeding. Foreman Trust & Savings Bank, Administrator of the Estate of Lucille Karbowski, brought an action for the wrongful death of Lucille Karbowski against Albert Valkima and Ralph Valkima, individually and as co-partners, doing business as A. Valkima & Sons, and obtained a judgment for $4,000. Thereafter, and prior to the institution of the garnishment proceedings in question, an execution was issued and returned no property found. On November 1, 1927, garnishment proceedings were instituted by the filing of an affidavit, in which it was alleged "that Equitabl Casualty Underwriters, by Smith, Lawson, Coambs Company, attorneys in fact, are indebted to said Defendants, or have effects or estate of said Defendants in their hands." On the same date interrogatories were filed against "Equitable Casualty Underwriters by Smith-Lawson-Coambs Co., attorneys in fact, Defendants." On the same date a writ of garnishment summons was issued which summoned "Equitable Casualty Underwriters, by Smith, Lawson, Coambs Company, attorneys in fact," to answer. The return on this summons reads: "Served this writ

[illegible]

[illegible] A. [illegible],
administrator of the estate
of [illegible] [illegible],
[illegible],

v.

[illegible] [illegible] et al.,
[illegible] - [illegible].

On appeal of SMITH-LAWSON-DUNCAN
COMPANY,
[illegible].

M. JUSTICE [illegible] delivered the opinion of the court.

Smith-Lawson-Duncan Company, appellant, seeks to reverse a judgment entered against it in the Superior Court of [illegible] County for $4,277.48 in a garnishment proceeding. [illegible] Bank, garnishee-defendant of the estate of [illegible], deceased, as security for the [illegible] debts of [illegible] Valkins and [illegible] Valkins, individually and as [illegible] doing business as [illegible]. Valkins & [illegible], are obligees [illegible]. Therefrom, and prior to the institution of the garnishment proceeding in question, an execution was issued and returned [illegible] found. On November 1, 1947, garnishment proceedings were instituted by the filing of an affidavit, in which it was alleged that [illegible] Casualty Underwriters, by [illegible], [illegible], [illegible] in fact, are indebted to said defendants, or have effects or [illegible] of said defendants in their hands." On the same day garnishment [illegible] were filed against Fidelity-Casualty Underwriters by Smith-Lawson-Duncan Co., although in fact, defendant [illegible] in the same day a writ of garnishment against the [illegible] Fidelity-Casualty Underwriters, by Smith, Lawson, Duncan Company, although in fact, [illegible] to answer. The return on the [illegible] writ [illegible] that

on the within named Equitable Casualty Underwriters of the said defendant by delivering a copy thereof to J. B. Coombs, attorney in fact of the said defendant this 2nd day of November, 1927. Charles E. Graydon, Sheriff, by Thomas C. Buhman, Deputy." On December 7, 1927, the following appearance was entered: "We hereby enter the appearance Equitable Casualty Underwriters by Smith-Lawson-Coombs Co., attorneys in fact, as defendants and our appearance as attorneys for said Defendants in the above entitled cause. Lee Phelps & Cleland, Attorney for Garnishee Defendants." On the same date, "Equitable Casualty Underwriters by Smith-Lawson-Coombs Co., attorneys in fact, garnishee defendants," in answer to the said interrogatories, denied that it had in its possession any moneys, rights, credits or effects due to either Albert Valkima and Ralph Valkima, individually or as co-partners, doing business as A. Valkima & Sons, or that it was in any way indebted to said parties, and denied that it had ever issued an insurance policy to the defendants in the original suit. On May 12, 1928, an affidavit was filed in which it was stated "that Equitable Underwriters by Smith, Lawson, Coombs Company, a corporation, Attorneys-in-fact, are indebted to said Defendants, or have effects or estate of said Defendants in their hands," and on motion the following order was entered: "Leave is hereby given to make Equitable Underwriters party defendant to the garnishment proceeding herein and for process to issue against said Equitable Underwriters by Smith-Lawson-Coombs Co., a corporation, manager and atty. in fact." On the same date interrogatories were filed against "Equitable Underwriters, by Smith, Lawson & Coombs Company, a Corporation, attorneys-in-fact, impleaded with Equitable Casualty Underwriters," and a garnishee summons was issued against "The Equitable Underwriters, by Smith, Lawson & Coombs Company, a corporation, Attorneys in Fact, impleaded with the Equitable Casualty

on the claim made [illegible] Thereafter, [illegible] defendant by delivering a copy thereof to [illegible], attorney in fact of the sole stockholder and the [illegible] of Charles F. Trydon, Inc., by Thomas [illegible], secretary. On December 7, 1947, the following opinion was rendered: "In hearing under the appearance [illegible] Charles F. Trydon, Inc., [illegible] Lemon-Lemon Co., attorneys in fact, on [illegible] and appearance as attorneys for said defendants in the above entitled cause, Leo Phelps & Gleason, attorney for [illegible] defendant," in the same date, "equitable [illegible] by Smith-Lemon-Lemon Co., attorneys in fact, [illegible] defendants," in [illegible] interrogatories, denied that it had in the possession or control, rights, credits or effects due to either Jerry Valkins and Ralph Valkins, individually or in co-partnership, doing business as Valkins & Jones, or that it was in any way indebted to said parties, and denied that it had ever issued an insurance policy to the defendants in the original suit. On May 13, 1948, an affidavit was filed in which it was stated "that equitable underwriters by [illegible], Lyman Combs Company, a corporation, attorneys-in-fact, are indicted in said interrogatories, or have effects or assets or said defendants in their hands," and on motion the following order was entered: "Leave is hereby given to make equitable Underwriters party defendant in the garnishment proceeding herein and for process to issue against said equitable Underwriters by Smith-Lemon-Lemon Co., a corporation, manager and agent, in fact, [illegible] the same [illegible] were filed against Equitable Underwriters, by [illegible], Lyman & Combs Company, a Corporation, attorneys-in-fact," and a garnishee summons was issued against "the equitable Underwriters, by [illegible], Lyman & Combs Company, a corporation, attorneys in fact, engaged with the [illegible]

Underwriters." The return of this summons reads: "Served this writ on the within named The Equitable Underwriters, by delivering a copy thereof to A. H. Smith, agent of Smith, Lawson & Coambs Company, this 14th day of May, 1928. Charles E. Graydon, Sheriff, by Thomas P. Brohman, Deputy." Thereafter the following appearance was entered: "We hereby enter our appearance for said garnishee and the appearance of said garnishee Defendant in the above entitled cause. Lee Phelps & Cleland, Attorney for Garnishee deft." Thereafter, "Equitable Underwriters by Smith-Lawson-Coambs Co., a corporation, attorneys in fact, garnishee defendants impleaded herein, by Lee, Phelps & Cleland, their attorneys," in answer to the interrogatories, denied any indebtedness and denied that it issued any policy of public liability insurance to the defendants in the original suit. Thereafter the garnishment proceedings came on to be heard before the court. During the course of the hearing, and over the objection of the garnishees, the defendants were given leave to traverse the answers of the garnishees. At the conclusion of the evidence the court entered the following order: "The Court does find the issues in favor of the plaintiff and against the defendant and does find that said garnishee is indebted to Albert Valkima and Ralph Valkima, individually, and as co-partners, doing business as A. Valkima & Sons, in the sum of $4,000.00, together with interest thereon, at the rate of five (5%) per cent per annum, from the seventeenth day of December, A. D. 1926, and costs in said cause amounting to $19.15 making a total of $4377.48, to which finding defendant duly excepts." Certain motions then interposed by the defendant garnishee were overruled and the court thereupon entered the following judgment: "Whereupon, it is considered and adjudged by the Court that the plaintiff do have and recover of and from the defendant garnishee herein, Smith, Lawson, Coambs Company,

underwriters." The return of this summons, Sheriff [illegible] served this writ on the within named the "Quisqueya Underwriters", by delivering a copy thereof to [illegible] H. Smith, agent of said, Lawson & Combs Company, this 16th day of May, 1916. Service [illegible] Sheriff, by Thomas F. Bradham, deputy." Interposing the following appearance was entered: "We hereby enter our appearance for said garnishee and the appearance of said garnishee [illegible] in the above entitled cause. Lee Phillips & Claiborne, Attorneys for Garnishee [illegible]." Thereafter, "Quisqueya Underwriters by [illegible] Agent", a corporation, answers in fact, garnishee defendants indebted herein, by Lee, Phillips & Claiborne, their attorneys, in answer to the interrogatories, denied any indebtedness and denied that it issued any policy of public liability insurance in the indemnities in the original suit. Thereafter the garnishment proceedings came on to be heard before the court. During the course of the hearing, and over the objection of the garnishees, the interrogatories were [illegible] leave to traverse the answers of the garnishees. At the conclusion of the evidence the court entered the following order: "The court does find the issues in favor of the plaintiff and against the defendant and does find that said garnishees is indebted to Janet Valkins and Ralph Valkins, individually, and as co-partners, doing business as [illegible] Valkins & Cone, in the sum of $[illegible], together with interest thereon, at the rate of five (5%) per cent per annum from the seventeenth day of December, [illegible] 1916, and costs in this cause amounting to $[illegible] making a total of $[illegible], to which finding defendant only excepts." Certain witnesses then introduced by the defendant garnishee were overruled and the court thereupon entered the following judgment: "Wherefore, it is considered and adjudged by the Court that the plaintiff do have and recover of and from the defendant garnishee herein, [illegible], [illegible],

a corporation, attorney in fact for Equitable Underwriters, the sum of $4377.48, together with costs of this suit, and have execution therefor issue." "Smith, Lawson, Coambs Company, a corporation, attorney in fact for Equitable Underwriters," has prayed an appeal from this judgment.

In its brief the appellant argues a number of contentions. We deem it necessary to refer to only one. The appellant contends that the court had no personal jurisdiction of the judgment debtor Smith-Lawson-Coambs Company; that at no time was the judgment debtor made a party to the proceedings; that process never issued for it at any time and it never entered an appearance or submitted itself to the jurisdiction of the court, and that the trial court was without jurisdiction or authority to enter a personal judgment against it. The appellee concedes, as it must, that the judgment in question is against the Smith-Lawson-Coambs Company, and in answer to the instant contention of the appellant it says: "We respectfully submit this judgment was properly entered against Smith-Lawson-Coambs Company, proper party to the record, properly in court and correctly pleaded." As we read the record garnishment proceedings were brought against Equitable Underwriters and Equitable Casualty Underwriters only, and those companies were the only garnishee defendants. In its affidavits, summonses and interrogatories the appellee designates Smith-Lawson-Coambs Company, a corporation, as "attorney in fact" for Equitable Casualty Underwriters and Equitable Underwriters. An attorney in fact is an agent for a principal. The appellant, therefore, in its writs and pleadings treated Smith-Lawson-Coambs Company as a mere agent for its principals, Equitable Casualty Underwriters and Equitable Underwriters. We do not find any merit in the contention of the appellee that the appearancesfiled may be construed as appearances of Smith-

Lawson-Coambs Company and that therefore it submitted itself as a garnishee defendant to the jurisdiction of the court. A careful study of the record fails to disclose any personal jurisdiction over Smith-Lawson-Coambs Company. It would have been a very simple matter for the appellee to have made the appellant a garnishee defendant had it so desired. None of the decisions cited by the appellee in support of the judgment appealed from has any bearing upon a record like the present one. The appellee further contends that the appellant, during the proceedings, did not question the jurisdiction of the trial court and that therefore it voluntarily submitted itself to the jurisdiction of the court. It is a sufficient answer to this contention to say that until the entry of the judgment order the appellant had no occasion to raise any question of jurisdiction. Even the court's finding, upon which the judgment should be based, is not a finding against the appellant. In fact, as there were two garnishee defendants, it is impossible to tell from that order which of the two the trial court found was indebted to the appellee. The appellee further argues that "reading between the lines, we think it is a safe conclusion that Smith-Lawson-Coambs Company and its stockholders and directors are, in fact, Equitable Underwriters," and that that company has trust funds which should be reached for the benefit of a policy holder or judgment creditor of a policy holder in Equitable Underwriters. Such an argument can have no weight in determining the instant contention. If Equitable Underwriters is indebted to the defendants in the original suit and if Smith-Lawson-Coambs Company has trust funds belonging to Equitable Underwriters, the appellee, by appropriate procedure, can reach that fund. It must be remembered, however, that garnishment proceedings will reach only such assets in the hands of the garnishee as can be reached by an action at law.

The judgment of the Superior Court of Cook County is reversed. REVERSED.

Gridley, P. J., and Barnes, J., concur.

33223

MAX EKELMANN,
Appellant,

vs.

EDWIN L. DUNCAN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Max Ekelmann, plaintiff, sued Edwin L. Duncan, defendant, in the Municipal Court of Chicago, in an action of contract. A jury was waived and the cause was submitted to the court, and after evidence heard the court found the issues against the plaintiff. Judgment was entered on the finding and this appeal followed.

The statement of claim alleged the execution of a written lease between the parties for a period of two years beginning May 1, 1925, and ending April 30, 1927, at a monthly rental of $125, to be paid in advance; that the defendant, on October 30, 1926, vacated the premises without the acquiescence or consent of the plaintiff. The plaintiff sued to recover rent for the months of November and December, 1926. The defendant filed an affidavit of merits admitting the execution of the lease and that he vacated the premises about October 30, 1926, but denying that he vacated the premises without the knowledge, acquiescence or consent of the plaintiff, and alleging that on October 22, 1926, the plaintiff and he "verbally mutually cancelled" the lease, and that pursuant to such cancellation the defendant immediately thereafter "located another place for himself and family and surrendered the leased premises to the plaintiff and that at said time the surrender of said leased premises, together with the key thereto, was accepted by the plaintiff," and the defendant denied that he was indebted to the plaintiff for the rent in question or

for any other sum whatsoever.

The plaintiff first contends that "the burden of proving the express agreement of the parties to cancel the lease and the surrender of the premises and acceptance thereof was on the lessee." This contention may be conceded.

The plaintiff next contends that it was necessary for the defendant "to prove by a greater weight of the evidence that not only did the parties agree to a surrender up of the lease but that it was an executed agreement." This contention may also be conceded.

The plaintiff contends that "the finding of the trial court and the judgment thereon is against the manifest weight of the evidence." After a very careful examination of the record in this case, we are unable to sustain this contention.

The defendant called the plaintiff as a witness under section 33 of the Municipal Court Act and the latter gave evidence tending to support his theory of fact, and the plaintiff contends that the defendant, having called him, vouched for his character and truthfulness and was bound by his testimony, and that this court is therefore bound to find the facts as testified to by the plaintiff when he was thus called as a witness by the defendant. It is a sufficient answer to this contention to say that section 33 specifically provides that the party calling the adverse party for examination under the section "shall not be concluded thereby, but he may rebut the testimony thus given by counter testimony."

The plaintiff next contends that the trial court admitted improper evidence on behalf of the defendant. This contention relates to the admission of certain evidence as to the condition of the furnace in the premises in question. The court admitted it with the proviso that the merits of the objection to the testimony could be thereafter argued. We fail to find, in the record, that the

for any other use, whatsoever.

The plaintiff first contends that the action of trial court in overruling objections of his attorney to answer the jurors questions of the prosecuting attorney and accepting testimony from the jurors, was a violation of his rights and constitutions thereof in the premises. Into consideration may be considered.

The plaintiff also contends that it was improper for the defendant to prove by a juror that he is the witness that all only did the parties agree to a mistrial on of the case. The jury it was an unusual agreement." This contention can not be considered.

The plaintiff contends that "the judgment of the trial court and the judgment therein is against the weight of the evidence." After a very careful consideration of the record in this case, we are unable to agree with plaintiff.

The defendant testified he committed no crime under section 85 of the statutes; Court did not let the latter give evidence tending to support his theory of (self) and the plaintiff contends that the testimony, during which he, crossed for his accomplice and trustbidness and was upset by his testimony, and that the court is therefore bound to find he was not guilty of the charge by the plaintiff when he was then called as a witness for the defendant. It is a sufficient answer to this contention to say that answers to qualificatory questions that the truth only, the adverse party for cross-examination under the testimony should not be qualified thereby, but he may reset the testimony thus given by counter testimony."

The plaintiff cite numerous well our trial court and mitted improper evidence on behalf of the defendant. This contention also relates to the admission of certain evidence in the cross-examination of the witnesses in the direction. The court permitted it with the proviso that the witness in question, the court permitted it with the proviso that the witness in question in the testimony could be interpreted argued. He felt it that, in the record, that the

plaintiff made any attempt to take advantage of the proviso. We do not deem it necessary to decide the question as to whether the evidence complained of was competent or incompetent, as the sole question in the case was: Did the parties, by an express agreement, cancel the lease, and did the defendant thereafter surrender the premises to the plaintiff and did the latter accept the surrender of the same; and the short opinion delivered by the trial court, in deciding the case, shows that he understood the real issue and that he based his finding upon the evidence that related to it.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

plaintiff made any attempt to take advantage of the verdict. He did not deem it necessary to decide the question as to whether the wild dance constituted of was conducted or transpired, in the same manner in the same way: that the parties, by a joint agreement, waived the issue, and did the surrounding circumstances constitute the material to the plaintiff and did the latter assert the existence of the same; and the court opinion delivered on the trial court, in affirming the case, shows that he substituted the final issue of law, in order his finding upon the evidence that related to it.

The judgment of the municipal court of Boston is affirmed.

So ordered.

Grinley, C. J., and Davis, J., concur.

33263

BELLA SCHIFF,
Defendant in Error,

vs.

SARAH STAMLER and
PHILLIP STAMLER,
Plaintiffs in Error.

ERROR TO COUNTY COURT
OF COOK COUNTY.

237

252 I.A. 657

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendants seek to reverse a judgment rendered against them in the County court of Cook County on May 10, 1927, for $599.55.

It appears from the record that plaintiff, on October 31, 1923, brought an action of assumpsit against the defendants to recover damages claimed to have been sustained by her by reason of the defendants' breach of warranty conveying certain premises to plaintiff; the breach alleged being that the defendants had represented that the boiler in the premises was in first-class condition and would heat the three-flat building in which it was located. It was averred that the boiler was defective and plaintiff was obliged to install a new boiler at a cost of $5[illegible]. A further element of damages was that when plaintiff purchased the property there was a quantity of coal, represented by defendants to be about 38 tons, which plaintiff paid for, and it was afterwards ascertained that there were but 33 tons, and the overpayment thus made by plaintiff was also sought to be recovered.

The declaration was in three counts - the first a special count setting forth the facts above stated; the 2nd and 3rd counts were the common counts. In the special count plaintiff alleged that the purchase by her of the premises was evidenced by a written contract which plaintiff sought to be made an exhibit to the declaration by attaching it thereto. Under the common law

system of pleading in this state, the contract cannot be considered as a part of the declaration. Plew v. Board, 274 Ill. 232.

January 15, 1924, the defendants filed a general demurrer to the declaration. On April 29, 1927, the demurrer was over-ruled, leave given the defendants to file the plea within five days, and the case set for trial on May 10, 1927. On May 10th the defendants, having failed to plead, were defaulted and judgment was entered in favor of plaintiff on the affidavit of claim which she filed with her declaration. Several months afterwards the defendants filed their motion to vacate the judgment. Plaintiff demurred to the motion; the demurrer was over-ruled, the judgment vacated and set aside, and plaintiff appealed to this court. Upon consideration we reversed the order. (Schiff v. Stamler, No. 32640.) We there held that while the defendants contended that they had not been notified that their demurrer to plaintiff's declaration was to be disposed of, yet the record showed they were present in court. We further held that if this were not the fact, it was not such an error as could be corrected under section 89 of the Practice act. Afterwards the County court, on motion of defendants, entered an order on June 2, 1928, purporting to correct the record, which showed that the defendants were not present at the time their demurrer was over-ruled nor at the time the judgment was entered against them, and further that no evidence was heard. The order as corrected states: "This day came the plaintiff, by her attorney, upon a call of the calendar of common law cases, and the defendants came not, and were not represented by their attorney, and thereupon after a hearing, on motion of the plaintiff's attorney, said defendants' demurrer is hereby over-ruled and it is further ordered that said defendants have leave to file pleas within five days from date hereof, and a further hearing of said cause is hereby set for May 10, 1927."

system of pleading in this state, the [illegible] [illegible] is considered as a part of the declaration. [illegible] v. [illegible], [illegible] Ill. [illegible].

January 15, 1957, the defendants filed a special demurrer to the declaration. On April [illegible], 1957, the demurrer was over-ruled, leave given the defendants to file [illegible] within five days, and the cause set for trial on May 10, 1957. On May 10th the defendants, having failed to plead, were defaulted and judgment was entered in favor of plaintiff on the affidavit of claim which she filed with her declaration. Several months afterwards the defendants filed their motion to vacate the judgment. Plaintiff demurred to the motion; the demurrer was overruled, the judgment vacated and set aside, and plaintiff appealed to this court. Upon consideration we reversed for error. ([illegible] v. Stengler, [illegible].) We there held that while the defendants contended that they had not been notified that their demurrer to plaintiff's declaration was to be disposed of, the [illegible] shows they were present in court. We further held that if this were not the fact, it was not such an error as could be corrected under section 89 of the Practice Act. Afterwards the County court, on motion of defendants, entered an order on June [illegible], 1958, purporting to correct the record, which recited that the defendants were not present at the time their demurrer was overruled nor at the time the judgment was entered against them, and further that no evidence was heard. The order as corrected recites: "It is now ordered the plaintiff, by her attorney, upon a call of the calendar of common law causes, and the defendants came not, nor were said defendants by their attorney, and thereupon after a hearing, on motion of the plaintiff's attorney, said defendants' demurrer is hereby over-ruled and it is further ordered that said defendants have leave to file pleas within five days from date hereof, and a further hearing of said cause is hereby set for May 10, 1957."

On this writ of error the defendants have made ten assignments of error. Eight of them question the ruling of this court in rendering the former opinion. Obviously these alleged errors cannot be considered on this writ of error. The former opinion and decision is in no way involved in the matter now before us. Two of the assignments of error question the ruling of the trial court and are therefore properly before us. One is that the trial court erred in not sustaining the defendants' demurrer to the declaration because, it is argued, the declaration did not state a cause of action. As stated, the declaration was in three counts, one a special count and two common counts. It is elementary that the common counts are not subject to a demurrer. In these circumstances of course the demurrer was properly over-ruled.

The next error assigned is that the trial court erred in rendering judgment without hearing any evidence and that the affidavit attached to plaintiff's declaration was insufficient upon which to render judgment. Plaintiff, in her affidavit of claim, swore that her demand was for the recovery of money paid by her to defendants in reliance on warrants made by the defendants, and that there was due to plaintiff, after allowing the defendants all just credits, deductions and set-offs, $599.55. We think this affidavit of claim was sufficient to warrant the entry of the judgment without evidence. Moreover, even if the other points contended for by the defendants were properly before us, we think we would not be warranted in disturbing the judgment. The contention made by the defendants is that under rule 12 of the County court of Cook county, they were entitled to notice before their demurrer could be disposed of, and that since no such notice was given, it was error to overrule the demurrer in the defendants' absence. Rule 12 is as follows: "Motions not of course, or contested motions will be heard on each Saturday of the term, after disposition of motions for new trial on

that day, one day's notice in writing having been previously given. The clerk will, from time to time, prepare a calendar of contested motions, upon which such motions will be placed in the order in which notice thereof was given to him. A peremptory call of such motions will be made when ordered by the court, of which three days notice will be given in the Law Bulletin." There can be no doubt that if this rule applied, the contention of the defendants would have to be sustained, because it is the law that a rule of court with reference to practice has all the binding effect of the statute. Axtell v. Pulsifer, 155 Ill. 141. But plaintiff contends that this rule does not apply where the case is reached on the call of the calendar; that in such a situation rule 8 applies. Rule 8 is as follows: "Parties shall take notice of all calls of the calendar. No motion will be heard or order made in any cause without notice to the opposite party when an appearance of such party has been entered, except where a party is in default or when a case is reached on the call of the calendar." If the case is reached on the call of the calendar, then under this rule no notice need be given of any motion or order. In the instant case, the defendants, after the rendition of the former opinion by this court, went into the County court and on their motion had the record corrected, part of which we have above quoted. That correction states: "This day came the plaintiff, by her attorney, upon a call of the calendar of common law cases." The follows the over-ruling of the defendants' demurrer. Under rule 8 no notice was required, because it expressly exempted from notice all motions or orders made when the case is reached on the call of the calendar. In these circumstances, the defendants were entitled to no notice. Mix v. Chandler, 44 Ill. 174. Furthermore, after the opinion was rendered by this court plaintiff procured what she calls an order to be

that day, one party's action is within being also practically given. The other will, from time to time, [illegible] motions, some which seem [illegible] which notice thereof was given to each. A preliminary [illegible] motions will be made. Can [illegible] by the [illegible], or must [illegible] notice will be given in the [illegible] motion?" Surely [illegible] that if this rule applies, the [illegible] of the defendants would have to be [illegible], because it is [illegible] with [illegible] to [illegible] as all the [illegible] relative. Kuhlik v. Smallen, 187 [illegible], 191. But plaintiff [illegible] that this rule does not apply [illegible] on the call of the calendar; that is [illegible] Rule 2 is as follows: "Parties shall [illegible] the calendar. No motion will be [illegible] without notice to the opposite party [illegible] party has been [illegible], except [illegible] case is reached on the call of the calendar." If the case is reached on the call of the calendar, then after this rule is [illegible] be given if any notice of other. In the instant case, the defendants, after the [illegible] of the [illegible] motion by [illegible], went into the [illegible] and on their motion had the [illegible] part of which we have [illegible]. That [illegible] stated: "This day came the plaintiff, by her attorney, and [illegible] for the [illegible] of the [illegible] Plaintiff's demurrer. Under this [illegible] defendants, because it [illegible] from [illegible] or orders made when the case is reached on the call of the calendar. As later [illegible] stated, the defendants were [illegible] in [illegible]. Kuhlik v. Chandler, 46 Ill. 194. Furthermore, after the motion was [illegible] by this court [illegible] the [illegible] to be

entered by the Judge who tried the case, which states that the cause "came up on the regular call of the trial calendar pursuant to notice thereof in the Law Bulletin on April 29, 1927."

In view of the record before us, the case having been reached on the call of the calendar, defendants were entitled under rule 8 to no notice that their demurrer would be called up for disposition.

The judgment of the County court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

entered by the judge and issue the order, with notice that the
[illegible] "[illegible]" by on the regular call of the trial calendar [illegible]
to notice thereof to the law [illegible] on April 18, 1970.

In view of the foregoing motion, the [illegible]
been received in the [illegible] of the defendant, [illegible]
motor rail [illegible] be notified [illegible]
for disposition.

The [illegible] of the [illegible] motor [illegible]
affirmed.

[illegible]

Respectfully [illegible], [illegible].

33282

L. T. ELLIS CO., a Corporation,
Appellee,

vs.

FRANK KANTOR.

EMPIRE LUMBER COMPANY, a Corporation, Garnishee,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 658

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Empire Lumber Company, the garnishee, seeks to reverse a judgment entered against it for $528.50.

January 16, 1928, L. T. Ellis Company caused judgment by confession to be entered in the Municipal court of Chicago against Frank Kantor for $363.50. Afterwards an execution was issued and demand made, but the bailiff having failed to obtain any satisfaction, the execution was returned wholly unsatisfied. July 11, 1928, an affidavit for garnishee summons was filed in which the Empire Lumber Company was named as garnishee. The summons was served and the Lumber company answered that it was not indebted nor had it any property belonging to Kantor, the judgment debtor. The answer was contested and upon a hearing before the court without a jury, the court found the issues against the garnishee and that there was due from it to Kantor $528.50. Judgment was entered on this finding and the garnishee appeals.

The garnishee contends that the judgment is wrong and should be reversed because the claim, if any, which Kantor had against it, the garnishee, was for unliquidated damages and that garnishment will not lie in such case. In support of this contention the cases of Capes v. Burgess, 135 Ill. 61, and Shraiberg

U. T. SLATE CO., a
Corporation,
Appellant,

vs.

FRANK BAXTER,

Appellee.

Appeal from Superior Court,
a Corporation, [illegible]
Appellee.

[illegible]

[illegible]

[illegible]

[illegible]

By this appeal the appellee seeks reversal, the contention, seems to reverse a judgment for two dollars in his favor.

January 16, 1924, U. T. Slate Company obtained judgment by default in the Superior Court of Alameda against Frank Baxter for $[illegible]. Afterwards in execution the issued and levied upon, but the Baxter Service failed to obtain any satisfaction, the execution was returned unsatisfied. May 12, 1924, an affidavit for garnishment through our firm in favor of the Baxter Company was served on garnishee. The garnishee was served and the Baxter company contended that it was not indebted and by reason thereof failed to answer, the garnishee notice. The answer was contested and upon a trial before the court without a jury, the court found the issues against the garnishee and that there was due from it to Baxter $[illegible]. Judgment was entered on this finding and the garnishee appeals.

The principal contention that the Baxter [illegible] from, and should be received because the state, if any, which Baxter had against it, the garnishee, was for unliquidated damage and that garnishment will not lie in such case. In support of this contention the cases of Cohen v. [illegible], 132 Ill. 13, and Brighton

Mfg. Co. v. Boston Ins. Co., 246 Ill. App. 196, are cited. These cases sustain the garnishee's contention. It is there held that garnishment proceedings will not lie where the claim of the judgment debtor against the garnishee is for unliquidated damages.

Plaintiff admits that this is the law but it contends that in the instant case the damages are liquidated and therefore the judgment of the trial court should be affirmed. On this question Kantor gave testimony to the effect that he had entered into an oral contract with the Empire Lumber Company to install certain plumbing for the Empire Lumber Company in a building owned by one Wenzig, for which the Lumber company had agreed to pay Kantor $485; that the work was done and Kantor paid $442.25. There is substantially no controversy as to the foregoing, but further evidence offered on behalf of Kantor tended to show that he had done extra work on the premises in question for which there was a balance due him of $485. The evidence on this question is conflicting, the garnishee's evidence tending to show that there was no arrangement between it and Kantor for doing any extra work, and a witness for the garnishee gave testimony to the effect that Mrs. Wenzig, owner of the premises, had extra work done on her own account, with which the garnishee had no connection. The testimony of Kantor on this question clearly shows that there was no specific agreement as to the amount he was to be paid for the work. We think it clear that the amount of the claim against the garnishee is unliquidated. Duncan Lumber Co. v. The Leonard Lumber Co., 332 Ill. 104, and cases therein cited. In that case it was held that damages arising from an alleged breach of contract to deliver lumber at a certain price, the damages claimed being the difference between the contract price and the market value of the lumber at the time the contract was violated, were unliquidated damages. In that case the court said (p. 108): "Bouvier was quoted as defining

Ala. Gt. S. Boston Ins. Co., 345 Ill. App. 286, are cited. These cases sustain the garnishee's contention. It is generally held that garnishment proceedings will not lie where the basis of the judgment debtor against the garnishee is for unliquidated damages.

Plaintiff admits such rule is the law but it contends that in the instant case the damages are liquidated and therefore the judgment of the trial court should be affirmed. In this connection Baxter gave testimony to the effect that he had entered into an oral contract with the Apple Lumber Company to install certain plumbing for the lumber company in a building owned by one Bessig, for which the lumber company had agreed to pay Baxter $480; that the work was done and Baxter was paid therefor. This is substantially as testifying as to the plumbing, and further evidence offered on behalf of Baxter tending to show that he had done extra work on the premises in addition [illegible], leaving a balance due him of $480. The evidence on this question is conflicting, the garnishee's evidence tending to show that there was no arrangement between it and Baxter for doing any extra work, and a witness for the garnishee gave testimony to the effect that Mrs. Bessig, owner of the premises, had extra work done at her own request, with which the garnishee had no connection. The testimony of Gardner on this question clearly shows that there was no specific agreement as to the amount he was to be paid for the work. We think it clear that the amount of the claim against the garnishee is unliquidated. Weaver Engine Co. v. Carlsmith Lumber Co., 200 Ill. 104, and cases therein cited. In that case it was held that damages arising from an alleged breach of contract to deliver lumber at a certain price, the measure thereof being the difference between the contract price and the market value of the lumber at the time the contract was violated, were unliquidated damages. In that case the court said (p. 108): "Counsel has quoted as including

'liquidated damages' to be a certain sum due, and that it must appear not only that something is due but also how much is due, or the debt is not liquidated. 'An unliquidated debt is one which one of the parties cannot alone render certain.'"

In the instant case Kantor's claim against the garnishee being unliquidated, garnishment will not lie.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

McSurely and Matchett, JJ., concur.

'liquidated damages' to be a reliable sum (or, not that it must be poor not only this condition is the but also and all if or, or the debt is not liquidated. 'In such circumstances it is the duty of the parties seeking above reader article.'

In the instant case the jury, after hearing the evidence being sufficiated, convinced all any lie.

The judgment of the Southern court in Michigan is reversed.

Reversed.

Mahoney and Kelsey, JJ., concur.

33309

CHRISTINE OENESS,
Appellant,

vs.

MICHAEL LUNDE,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

252 I.A. 658

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages for personal injuries. At the close of the plaintiff's case, on motion of the defendant, there was an instructed verdict in defendant's favor, judgment was entered on the verdict and plaintiff appeals.

The record discloses that between seven and eight o'clock on the morning of August 21, 1926, the defendant was driving his Ford coupe in Lake County, Illinois, when it overturned, as the result of which plaintiff was injured, necessitating the amputation of her right arm.

To plaintiff's declaration, which was in three counts, defendant filed the plea of the general issue and two special pleas, in the first of which he denied the possession and control of the automobile, and in the second special plea he set up that "plaintiff jointly possessed, controlled, drove, managed, operated and maintained the said motor vehicle," but the plea does not disclose who jointly possessed and controlled the motor vehicle with plaintiff.

Plaintiff was the only witness in the case. She testified that she lived in Chicago; that her niece, who was engaged to be married to the defendant, was visiting with plaintiff at her home, having been there for a few days prior to the day in question; that the niece had been working in Chicago and that she and the defendant had arranged to drive to the niece's home at Sturgeon Bay, Wisconsin;

that plaintiff was invited to accompany them; that on the morning in question defendant drove his Ford automobile to plaintiff's residence and assisted plaintiff and her niece in putting their grips and some lunch in the back of the car; that shortly after this the three persons got into the automobile, which had but one seat, plaintiff sitting at the right, the niece in the middle and defendant at the left, driving the automobile; that they drove north out of Chicago on Milwaukee avenue to the Waukegan road; that they then turned east and were traveling at a speed of about thirty miles an hour, and as they were turning to go north the automobile turned over and plaintiff was injured so that a few days thereafter it was necessary to amputate the right arm. Plaintiff further testified that the day was clear, the road in good condition and that there was no other traffic at the time of the accident. Although plaintiff was the only witness who testified, the facts as to how the accident occurred were not clearly developed.

It seems almost incredible that counsel for plaintiff did not develop the facts more fully. Counsel for plaintiff in his statement of the case says: "that said automobile, prior to said accident, was going east and when the same reached a point on said road where said road turned north the car overturned on its right side, pinning plaintiff's right arm underneath." But in his argument he states that "The evidence shows no apparent reason for the overturning of the car which would not have happened but for some act of negligence, either as to the condition of the car or in the management of the same, *** Experience teaches us that a car operated in such a manner as the car of defendant at and before the time of the accident will remain on the highway." And it is urged that plaintiff made out a case under the doctrine of <u>res ipsa loquitur</u>. A careful consideration of plaintiff's testimony tends to show that the automobile was being driven about thirty miles

an hour and as it was turning to the north it tipped over on its right side. It is obvious that the doctrine of res ipsa loquitur has no application. Everyone knows that if an automobile is driven fast around a corner it may tip over.

The defendant contends that plaintiff was a mere licensee and therefore no duty rested upon defendant except to refrain from wilfully injuring her. We think this is a misapprehension of the situation as disclosed by the evidence. It is obvious that plaintiff was invited to go in the automobile with the defendant and plaintiff's niece.

A further point is made that there was a fatal variance between the allegations of the declaration and the proof in that it was alleged in the declaration that the accident occurred on August 13, 1926, while the proof showed it was on August 21st. This variance was not pointed out on the trial; if it had been, a proper amendment to the declaration could have readily been made. It is further contended that no recovery can be had because the evidence discloses that plaintiff was guilty of contributory negligence, and in support of this counsel say "plaintiff took the chance of riding with a driver whose ability she knew nothing of, in a car, to the condition of which she apparently never gave a thought, and to do so she crowded three adults into a space built to accommodate but two people, although one of the three was the driver who required ample room for free movement of his arms and legs in the operation of the car. Further, it appears that there was nothing to prevent her from seeing a sign which indicated their course required a turn to the left and she said nothing to defendant thereof." We think the most that can be said in this regard on behalf of the defendant is that the question of whether plaintiff was in the exercise of due care for her own safety was for the jury to decide. We think the instructed verdict ought not to have

been given; that on the contrary the questions involved were for the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

33316

JOHN W. FOLLMER et al.,
Appellants,

vs.

BERNARD W. SNOW, Bailiff of the Municipal Court of Chicago, et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

252 I.A. 658

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal complainants seek to reverse a decree of the Superior court of Cook County, dismissing their bill and several amended bills of complaint after a hearing for want of equity.

September 27, 1927, complainants filed their original bill of complaint. Afterwards, upon motion, the court gave complainants leave to file an amended bill of complaint and on December 15, 1927, the amended bill was filed. Defendants demurred to the bill and amended bill. The demurrer was sustained and leave was given to complainants to file another amended bill, and on March 7, 1928, they filed their second amended bill of complaint. The defendants' demurrer to this bill was over-ruled and they filed their joint and several answers. Afterwards, the cause was heard before the Chancellor and on December 15, 1928, defendants, by leave of court, filed their third amended bill and on the same day the decree appealed from was entered.

The decree recites that the cause came on for hearing upon the second and third amended bills of complaint and the joint and several answers of the defendants; that the court heard the evidence and argument of counsel and it was ordered and decreed that the bills be dismissed for want of equity and this appeal followed. The substance of the allegations of the bills, so far as it is necessary for us to state them, are that one of the com-

[illegible]

JOHN T. [illegible] et al.,
Appellants,

vs.

[illegible]. MOW, [illegible] of
the Municipal Court of [illegible],
et al.,
Appellees.

[illegible]

By this appeal complainants seek to reverse a decree of the chancery court of Cook County, dismissing their bill and several amended bills of complaint after a hearing on the merits of equity.

[illegible] 27, 1957, complainants filed their original bill of complaint. Afterwards, upon motion, the court gave complainants leave to file an amended bill of complaint and on December 13, 1957, the amended bill was filed. Defendants demurred to the bill and amended bill. The demurrer was sustained and leave was given to complainants to file another amended bill, and on March 7, 1958, they filed their second amended bill of complaint. The defendants' demurrer to this bill was overruled and they filed their joint and several answers. Alternately, the cause was heard before the chancellor and on December 23, 1958, dismissed, by order of court. Final order being entered [illegible] on the same day the decree appealed from was entered.

The decree recites that the cause came on to be heard upon the answers and their amended bills of complaint and the joint and several answers of the defendants; that the court heard the evidence and arguments of counsel and is now advised and informed that the bills be dismissed for want of equity and are hereby dismissed. The sufficiency of the allegations of the bills, so far as it is necessary for us to state them, is set out at the time

By this appeal complainants seek to reverse a decree of the chancery court of Cook County, dismissing their bill and several amended bills of complaint after a hearing on the merits of equity.

[illegible] 27, 1957, complainants filed their original bill of complaint. Afterwards, upon motion, the court gave complainants leave to file an amended bill of complaint and on December 13, 1957, the amended bill was filed. Defendants demurred to the bill and amended bill. The demurrer was sustained and leave was given to complainants to file another amended bill, and on March 7, 1958, they filed their second amended bill of complaint. The defendants' demurrer to this bill was overruled and they filed their joint and several answers. Alternately, the cause was heard before the chancellor and on December 23, 1958, dismissed, by order of court. Final order being entered [illegible] on the same day the decree appealed from was entered.

The decree recites that the cause came on to be heard upon the answers and their amended bills of complaint and the joint and several answers of the defendants; that the court heard the evidence and arguments of counsel and is now advised and informed that the bills be dismissed for want of equity and are hereby dismissed. The sufficiency of the allegations of the bills, so far as it is necessary for us to state them, is set out at the time

plainants bought an automobile and in part payment gave his note and apparently the note was signed by the two other complainants, they being the father and mother of the purchaser of the automobile; that a chattel mortgage was given to secure a part of the purchase price of the automobile; that afterwards the chattel mortgage was foreclosed and after a sale, there being a deficiency, judgment was entered by confession on the note for the balance due and unpaid; that afterwards an execution was issued, a demand made, and the bailiff was proceeding to sell some real estate belonging to the complainants, the father and mother of the purchaser of the automobile. The prayer of the bill was that the sale be enjoined and the note for the balance of the purchase price of the automobile be held invalid.

The evidence taken by the Chancellor on the hearing is not preserved in the record. While the several bills consist of several typewritten pages and the answer of the defendants likewise consists of several pages, the abstract of these documents is set forth in about a half page in the abstract filed in this case. Obviously such an abstract is of no benefit to this court. Counsel for complainants state that while a number of points were urged by them in the trial court to sustain their bills, all of such points are waived except that the chattel mortgage note was void because it was made payable to "myself" - that there was no payee named in the note and therefore, under section 1, par. 27, chap. 95, page 1709 of Cahill's 1927 statutes, the note was void. That section provides: "That all notes secured by chattel mortgages shall state upon their face that they are so secured, and when assigned by the Payee therein named, shall be subject to all defenses existing between the Payee and the Payor of said notes the same as if said notes were held by the Payee therein named, and any chattel mortgage securing notes which do not state upon their face the fact of such

plaintiffs bought an automobile and it [illegible] that the note was apparently the note was signed by the two other plaintiffs, they being the father and mother of the purchaser of the automobile; that a chattel mortgage was given to secure a part of the purchase price of the automobile; that afterwards the chattel mortgage was foreclosed and after a sale, there being a deficiency, judgment was entered by confession on the note for the balance due and unpaid; that afterwards an execution was issued, a demand made, and the bailiff was proceeding to sell some real estate belonging to the complainants, the father and mother of the purchaser of the automobile. The prayer of the bill was that the sale be enjoined and the note for the balance of the purchase price of the automobile be held invalid.

The evidence heard by the chancellor on the hearing is not preserved in the record. While the abstract [illegible] several typewritten pages and the answer of the defendants likewise consists of several pages, the abstract of these documents is not forth in such a manner as the abstract filed in this case. Obviously such an abstract is of no benefit to this court. Counsel for complainants state that while a number of points were urged by them in the trial court to sustain their bill, all of such points are waived except that the chattel mortgage note was void because it was made payable to "bearer" - that there was no payee named in the note and therefore, under section 1, par. 27, chap. 95, page 1700 of Cahill's 1927 statutes, the note was void. That section provides: "That all notes secured by chattel mortgages shall state upon their face that they are so secured, and when assigned by the payee therein named, shall be subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee therein named, and any assignee or purchaser accepting notes which do not state upon their face the fact of such

security shall be absolutely void."

We have not the evidence in the record so that we are unable to say whether the payee of the note was mentioned or not. There is nothing in the section quoted that says chattel mortgage notes are void if they are made payable to the order of "myself." The statute provides only that such notes are void unless they state on their face that the payment of them is secured by chattel mortgage. Since we do not have the evidence before us, we must presume that it was sufficient to warrant the decree of the court. In such circumstances every presumption is indulged in favor of the decree. For aught that appears, complainants may have failed to prove any allegations in their bill that were traversed by the answer. Moreover, since the judgment was confessed in the Municipal court, if the complainants had any equitable defense in that case, we must presume that if a request had been made by them that they would have been permitted to make such defense there. Where the judgment is by confession, parties are not limited to 30 days thereafter to make such motion. On a motion to vacate such a judgment the court acts upon equitable considerations in refusing or allowing the defendants to come in and defend. No such motion appears to have been made. If such a defense could have been made there, obviously a court of equity had no jurisdiction. But in any event, there is no reason advanced that would warrant us in disturburbing the decree in view of the record before us.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

security shall be absolutely vel..."

To have had the evidence in the Court, or not to have treated it as any obstacle to the jurisdiction of the Court, or not. There is nothing in the Convention Relating that says Contract Marriage when one side of some the Land Property is not under at "Quiet." The Judge Advocate Only that one Judge are tell which they study on their face that the property is that is secured by Contract marriage. Since so do not need the evidence before us, we must decide that it was sufficient to warrant the Court of the matter. The main allegations are sufficiently in Judge to Court of the Charge. The more that appears, considerable may that Trial Counsel or Judge Advocate in their Contract was treated by the Jewess. However, since the Judgment was reversed in the Contract Court, if the Court Martial had any Property Marriage in that case, we must presume that if a mistake had been made by them that they Judge have permitted to make our defense weak. Since the jurisdiction of Contract, parties are not limited to an Judge Advocate after to make that action. In a Contract to result such a Judgment the Court made such qualifications considerations in reliance, or in Judge, the Jurisdiction to Case is not Judge. We must weight our power to make such Contract. It must be perhaps Court have made there, obviously a Court of equity has no jurisdiction. But in any event, there is no reason whatever for the Court Martial in disturbing the Jewess in view of the Judge Advocate.

The Jewess of the Property Court of Judge Advocate is affirmed.

AFFIRMED.

Summerly and Lambert, JJ., concur.

33343

MAX LEVIN,
Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY
et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

252 I.A. 658[4]

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a judgment of the Superior court of Cook county entered on a directed verdict in favor of the defendants.

Plaintiff brought suit against the defendants to recover damages for personal injuries claimed to have been sustained by him. The testimony offered by plaintiff tended to show that on July 9, 1927, plaintiff got into his Ford truck which was standing about 125 feet south of Polk street at the west curb in Western avenue, facing north. When plaintiff got in the truck he looked to the south and saw a northbound street car coming at a speed of from 20 to 25 miles an hour; it was then about 600 feet south of the truck. The defendants operated a double line of street cars in Western avenue and the street car in question was on the east or northbound track. The evidence further shows that at that time plaintiff talked to his son, who was standing near the truck, and just as plaintiff started the truck he again looked to the south and saw the northbound street car, which was then from 200 to 300 feet to the south. Plaintiff drove the truck at about 8 miles an hour towards the northeast, crossing the west or southbound street car track and then turned north, straddling the east rail of the northbound track. After he had travelled in this direction for about 60 to 75 feet, the truck was struck in the rear by the northbound street car, and plaintiff was injured. It was about 11

o'clock in the forenoon, the day was clear and there was no other traffic in the street.

Further evidence was offered showing the nature of plaintiff's injuries. He sustained a fracture of the clavicle and was confined in the hospital for a period of three weeks. On cross-examination of the plaintiff he was shown a release which he testified bore his signature. It was the ordinary form of release obtained by street car companies in such cases. It recited that plaintiff had received $60 from the defendants; and plaintiff testified on cross-examination that the defendants had paid him the $60. On objection by counsel for plaintiff the court held the cross-examination improper. The objection made by counsel for plaintiff was that the cross-examination was "mixing collateral issues as to something else that has no connection with this question." The court held it was proper for counsel to ask the witness whether he had signed the instrument. Further examination on this question was then apparently abandoned. Afterwards plaintiff called physicians who testified as to the nature and extent of plaintiff's injuries and the treatment given. At the close of this the jurors were given a short recess and plaintiff stated that he had introduced all his evidence as to the occurrence. Counsel for defendants then offered in evidence the release, when the following took place:

"THE COURT: There isn't any question about the efficacy of the release and the circumstances under which this record now stands.

"MR. MEYEROVITZ: Insofar as it affects that particular injury for which the release was given."

But without having the matter passed upon an argument followed on the point made by the defendants - that the court should direct a verdict in their favor. The court then indicated that he

would sustain defendants' contention and direct a verdict on the ground that the evidence showed that the plaintiff was not in the exercise of due care for his own safety. The defendants then offered in evidence the release. The jury was brought in and thereupon counsel for plaintiff stated:

"MR. MEYEROVITZ: I will object to the introduction of the release.

"THE COURT: What is your objection?

"MR. MEYEROVITZ: That it has no bearing upon the question involved.

"THE COURT: Why?

"MR. MEYEROVITZ: Because the defendant has not shown that the plaintiff understood the nature of the release.

"THE COURT: That is up to you to show. You plead that it was obtained by duress or fraud, but you haven't. There is no proof in the record.

"MR. MEYEROVITZ: I will except to the court's ruling."

Thereupon a verdict was handed to the jury which was signed by the Foreman. The verdict was: "We, the jury, find the defendants not guilty." Judgment was entered on the verdict and plaintiff appeals.

Plaintiff contends that the verdict should not have been directed because the question whether he was in the exercise of due care for his own safety should have been submitted to the jury and that it was error to receive the release in evidence at that time. We are of the opinion that the release should not have been received in evidence, although the objection made by counsel for plaintiff at the time it was offered was not technically the proper objection. Plaintiff had just closed his case and counsel for the defendants was arguing that defendants' motion for a directed verdict should be sustained. Obviously the defendants were not

while working defendants' employees was injured a verdict in favor
ground that the waiver signed when the plaintiff [illegible] in the
execution of a release for his own safety. The defendants then
offered to evidence the release. The jury was instructed to find
interposes counsel for plaintiff argues:

"Mr. McCormick: I will waive in the introduction
of the release.

"The Court: What is your objection?

"Mr. McCormick: That it has no bearing upon the
question involved.

"The Court: Why?

"Mr. McCormick: Because the defendant has not shown
that the plaintiff misunderstood the character of the release.

"The Court: That is up to you to show. The jury
that it was obtained by fraud or trick, or misrepresentation. There
is no proof in the record.

"Mr. McCormick: I will admit the [illegible]."

Thereupon a verdict was rendered in the only which was
signed by the foreman. The verdict was: "We, the jury find for the
defendants not guilty." Thereupon the [illegible] of the defendants and
plaintiff appeals.

Plaintiff contends that the verdict should not have
been directed because the question whether or not he is the proximate
of the acts for his own safety should have been submitted to the
jury and that there was error in sending the jury [illegible]
that line. We are of the opinion that [illegible] should not have
been received in evidence, although the objection was not by counsel
for plaintiff or the trial court was informed [illegible] the
proper objection. Plaintiff was not [illegible] the case and counsel
for the defendants was seeking [illegible] action in a directed
verdict should be sustained. Certainly the circumstances were not

entitled to introduce any evidence until the motion had been passed upon. Moreover, we think it appears from the record that the court, in passing on the motion of the defendants for a directed verdict, did not take the release into consideration.

The question then remains, whether all reasonable minds would reach the conclusion from the evidence that plaintiff was not in the exercise of due care and caution for his own safety. If all reasonable minds would not reach such conclusion, the question was one of fact and not of law. Louthan v. Chicago City Ry. Co., 198 Ill. App. 329; Vail v. Chicago Junction Ry. Co., 259 Ill. 476; The Chicago Union Traction Co. v. Jacobson, 217 Ill. 404; Kelly v. Chicago City Ry. Co., 283 Ill. 640. Upon a careful consideration of all the evidence, we are unable to say that all reasonable minds would reach the conclusion that plaintiff was not in the exercise of due care and caution for his own safety. And this too, although the defendants offered no evidence. Manthei v. Bell Ry. Co., 232 Ill. 568. Plaintiff was not required to demonstrate that he was in the exercise of due care for his own safety, but responsibility for the accident must be determined upon reasonable conclusions to be drawn from the evidence. Union Pacific R. R. Co. v. Huxoll, 245 U. S. 536. We think the motion of the defendants for a directed verdict should have been over-ruled. Libby, McNeil & Libby v. Cook, 222 Ill. 206.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McGurchy and Matchett, JJ., concur.

entitled to introduce any evidence until the motion had been passed upon. Moreover, we hold it manifest from the record that the court, in passing on the motion of the defendants for a directed verdict, did not take the present line of reasoning.

The petition here contains, whether all necessary allegations would result the conclusion that the evidence that plaintiff was not in the exercise of due care and caution for his own safety, if all circumstances alleged could not result such conclusion, the motion was sure to fail and not it was. Gardner v. Chicago, Rock Is. Co., 194 Ill. App. 396; Vail v. Illinois Central R. Co., 200 Ill. 476; The Illinois Trust & Savings Bank v. Chicago, 97 Ill. App. Kelly v. Chicago, 200 Ill. 214. Upon a careful and elaborate of all the evidence, we are unable to find any evidence which would result the conclusion that plaintiff was not in the exercise of due care and caution for his own safety. And with respect, the decisions the defendants cited are authority. Vandal v. Bell, 76, 220 Ill. App. Plaintiff's one contention is demonstrate that he was in the exercise of due care for his own safety, not reasonable. Ability for her negligent acts of defendant was proximate cause alone is to be drawn from the evidence. Illinois Central R. Co. v. Oxwell, 244 U. S. 720. As that was matter of the discretion in a directed verdict should not be overruled. Illinois Central R. Libby v. Cook, 220 Ill. 20.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

Reversed and remanded.

Barnsley and Matchett, JJ., concur.

33352

ANTHONY A. SLAKIS,
Appellee,

vs.

JOSEPH J. KRASOWSKI,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2521 A. 659

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse an order of the Superior court of Cook county entered November 9, 1928, denying his motion to set the case for hearing and to permit the defendant to make his defense.

The record discloses that on March 30, 1922, plaintiff brought an action of assumpsit against the defendant to recover $2,000 which he claimed to be due him by reason of a breach of a contract on the part of the defendant, and to recover for legal services and disbursements by plaintiff as attorney for the defendant. At the same time he sued out an attachment in aid which was levied on certain real estate. May 25, 1922, plaintiff filed his declaration consisting of a special count and the common counts. Following the special count was an affidavit of plaintiff's claim. June 3, 1922, defendant entered his appearance and filed a plea of the general issue and also an affidavit of merits, in which he denied any liability and set up with some detail the nature of his defense. May 18, 1923, in the absence of the defendant, the cause was reached for trial and there was an ex parte hearing before a judge and jury. The jury found the issues in favor of the plaintiff, assessing his damages at $2,000; it also found the attachment in favor of the plaintiff. On the same date judgment was entered on the verdict. The next day, May 19, 1923, counsel for the defendant served a notice on plaintiff, wherein they stated that on the fol-

lowing Monday, May 21st, they would appear before the trial judge, Hon. Edward D. Shurtleff, and move to vacate the judgment, and would submit in support of the motion two affidavits, which were attached to the notice. One of the affidavits was made by Israel S. Berkman, attorney for the defendant, and the other by Charles Reagh, who was also counsel for the defendant, both of them being members of the firm of Berkman, Reagh & Severin.

Berkman swears in his affidavit that Charles Reagh of his firm had charge of the case and was intending to try it before Judge Shurtleff; that it was on the trial call of Judge Shurtleff on May 18, 1923, being the 19th on the trial call; that the call was set for ten o'clock in the forenoon; that at 9:30 o'clock of that morning Reagh, who was then at his home, called up the office and stated that he was too ill to come down to try the case; that the other member of the firm, Severin, had shortly prior to that time left to try a case in the Municipal court to be heard in Room 1118, City hall; that Berkman had to attend the court calls on that morning, there being four cases set for trial at 9:30 a. m. in three different court rooms in the City hall and three cases set for ten o'clock a. m., which cases were apparently pending on the trial calls in the County building; that Berkman at ten o'clock that morning attended the calls in the Municipal court and one in the Circuit court, which was number 7 on the trial call of Judge Wilson, and as soon as he was through he hastened to Judge Shurtleff's court room, arriving there at 10:23 a. m., when he was advised by the clerk that the case had been called and heard and that the jury had already rendered its verdict. Affiant further stated that he was unable to get any assistance after hearing from Mr. Reagh on that morning. The affidavit further set up that the defendant had a meritorious defense.

The affidavit of Reagh set up that some time in 1922 defendant had endeavored to negotiate a settlement with plaintiff

and that plaintiff said he would take $250; that affiant desired to consult further about the settlement but had been ill for some time and was unable to do so; that on Friday, May 18, 1923, he telephoned his office about 9:30 stating he was too ill to come to the office at the usual time but that he would be down about eleven o'clock; that about eleven o'clock that morning he felt better and went to his office, reaching there about noon; that if he had not been ill on the morning of May 18th, he would have been able to appear before Judge Shurtleff on the call of the case; that he had prepared to defend the case and that he believed the defendant had a good defense.

May 26, 1923, Judge Shurtleff entered an order giving leave to defendant to file an amended affidavit of merits on or before June 11, 1923, and that the execution be stayed. June 7th the defendant filed an amended affidavit of merits setting up in detail the nature of his defense and denying any liability. January 21, 1927, an order was entered assigning the case to Judge Caylor's trial calendar, and on May 21, 1927, the parties appeared before Judge Shurtleff, when the defendant moved that an order be entered nunc pro tunc as of May 21, 1923, showing that he had made a motion to vacate the judgment at that time. The court found in its order that it appeared from the records of the Superior court that a petition and motion were filed on May 21, 1923; that the motion and petition were presented to the court on Saturday, May 26, 1923, both parties appearing; that during the hearing of the matter the court, without acting finally on the petition and motion, gave defendant leave to file an amended affidavit by June 11, 1923, and ordered that the execution be stayed, and that no action had been taken since that time on the motion; that the amended affidavit was filed June 7th, "and this court holds that said petition and motion to vacate the judgment as presented to the court on May 26, 1923, is now pending and undisposed of." The court therefore held that

and that plaintiff paid to [illegible] that [illegible] to counsel [illegible] the settlement of the case and that the same time and was unable to go out, [illegible] defendant terminated his office about 5:30 o'clock and was not able to come to the office at the usual time [illegible] that [illegible] went to the office, [illegible] he had not been ill as the [illegible] would have been able to appear before Judge [illegible] on the case, and he had prepared to defend the case and [illegible] he believed the defendant had a good defense.

May 22, 1926, [illegible] plaintiff [illegible] giving leave to defendant to file an amended affidavit of merits on or before June 1, 1926, and that the execution be stayed. June 9th the defendant filed an amended affidavit of merits setting up in detail the nature of his defense and denying any liability. January 21, 1927, an order was entered [illegible] Judge Taylor's trial calendar, and on May 16, 1927, the parties appeared before Judge [illegible], when the defendant moved that the order be entered nunc pro tunc as of May 22, 1926, showing that he had made a motion to vacate the judgment at that time. The court found in its order that it appeared from the records of the Municipal court that a petition and motion were filed on May 21, 1926; that the motion and petition were presented to the court on Saturday, May 22, 1926, with notice and hearing; that having the hearing of the matter the court, without ruling finally on the petition and motion, gave defendant leave to file an amended affidavit by June 1, 1926, and ordered that the execution be stayed, and that no action had been taken since that time on the motion, that the amended affidavit was filed June 9th, that this court holds that said petition and motion to vacate the judgment as presented to the court on May 22, 1926, [illegible]

a nunc pro tunc order was unnecessary and defendant's motion for such an order was denied.

On June 5, 1928, counsel for plaintiff served a notice on counsel for the defendant that they would, on the following morning, appear before Judge Pam and move the court that an order be entered directing the clerk to issue a writ of execution. The record fails to show any order on this motion. On November 9th defendant's motion that the cause be set for hearing and that he be permitted to defend was heard and denied, from which the defendant prosecutes this appeal.

We think the motion should have been allowed. The affidavit of merits and the amended affidavit of merits filed by the defendant tend to show that he had a meritorious defense and the two affidavits filed by the defendant's counsel and served on the counsel for plaintiff the next day after the judgment was entered set up a sufficient reason for the court to vacate the judgment with or without terms, as might appear proper. As stated, the motion to vacate the judgment was made the day after the judgment was entered and during the term at which it was entered. We think the affidavits disclose that counsel were guilty of little or no negligence, for it appears they would have been present to try the case but for the illness of one of defendant's counsel, who was to try the case; that unexpectedly a number of cases were on the calls of different courts which counsel was obliged to attend to; that he could not get other help that morning; that four of these calls were set for 9:30 in the morning and three others at ten o'clock; that the instant case was number 19 on the trial call; and the affidavit sets up that it was but 23 minutes after ten that he appeared before Judge Shurtleff. It also appears that when the matter came before Judge Shurtleff on the 26th he gave the defendant leave to file an amended affidavit of merits, strongly indicating that if defendant showed a meritorious defense he would

vacate the judgment. Why the matter lay in abeyance for a number of years does not appear. Counsel for the plaintiff made no motion that an execution be issued until June 5, 1916, and in these circumstances we think he ought not to be heard to complain that the defendant did not call the motion up finally until November 9, 1920.

The order of the Superior court of Cook county is reversed.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

33378

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOHN R. GRUDZIEN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

243

252 I.A. 659

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment of the Municipal court of Chicago finding him guilty "of the criminal offense of wilful and malicious assault with a deadly weapon without any considerable provocation and under circumstances showing an abandoned and malignant heart with intent then and there to inflict a bodily injury" on John Mika. The defendant was sentenced to 60 days in the House of Correction and a fine of $25 was imposed.

The information, filed by leave of court, charged that the defendant on, to-wit, the 10th day of August, 1926, "then and there being, did then and there with a certain instrument commonly called a revolver *** being a dangerous and deadly weapon, without any considerable provocation whatever, and under circumstances showing an abandoned and malignant heart, unlawfully, willfully and maliciously make an assault in and upon one John Mika, with intent then and there to inflict upon the person of said John Mika a bodily injury, contrary to the Statute."

After a number of continuances and a change of venue the defendant waived a jury and the cause was submitted to the court. The defendant entered a plea of not guilty, the court heard the evidence, found the defendant guilty as charged, and imposed the sentence as above stated. There is substantially no conflict in the evidence and from it it appears that the defendant

and John Mika were friends and had been schoolmates; that they had never had any quarrels or misunderstandings; that the defendant on August 8, 1928, returned from a trip to California and on the following evening Mika called on defendant at his home, where defendant lived with his father and mother; that Mika was looking at some pictures and photographs defendant had brought from California; that he then sat on the bed in the room and a revolver slipped out from under defendant's pillow; that Mika then took the gun in his hands and removed the cartridges, when defendant told him to put it away; that defendant then came and took the gun and as he was putting it together, it was discharged, the bullet striking Mika in the shoulder. Seeing what had happened, the defendant immediately took Mika on his shoulder and carried him about a block down the street to a doctor, where he was administered to by the doctor. The defendant told the doctor how the accident occurred. The police were called by the doctor and defendant was placed under arrest.

At the conclusion of the evidence defendant's counsel moved that defendant be discharged; that thereupon counsel for the People stated that he had two witnesses, who could not appear at the time, who would testify that some time after the accident they had met the defendant, when he told them that he had shot Mika so he could get into the movies. The court refused to grant defendant's motion but said he would continue the case for the reason that he wanted defendant examined by Dr. Hickson, and the case was then continued. Afterwards the case was again called and the record discloses that the defendant had been examined by Dr. Hickson, who reported that he found the defendant "non committable." The State then called the two witnesses who testified that they had met the defendant some time after the accident and that he stated that he shot Mika so that he could get publicity and get into the movies.

At the conclusion of all the evidence the defendant's

and John Blue were friends and had been neighbors; that one had never had any quarrels or altercations; that on Saturday, August 6, 1932, returned from a trip to Philadelphia on the following evening here walked to defendant's farm home, where the defendant lived with his family and another; that Blue was carrying some pictures and miscellaneous documents and brought from witnesses that he had in his pocket a revolver which he had received from defendant's father; that after they had finished looking at the pictures, defendant came out and took the gun and in his hands and removed the cartridges, -- he (defendant) said he put it away; that defendant then came and took the gun and as he was putting it together, it was discharged, the bullet entering Blue in the shoulder. Testimony that defendant, the defendant's father-in-law and a neighbor had seen Blue a short time before the shooting on his shoulder and carried the shirt a short time the place to a doctor, where he was administered to by the doctor. The defendant told the doctor how he accidentally discharged. The doctor called by the doctor and testified the wound was very slight.

At the conclusion of the evidence defendant's counsel moved that defendant be discharged; that there was no cause for the people stated that he had two witnesses, the doctor and another at the time, who would testify that many time after the accident they had met the defendant, -- he told them that he had shot Mike as he could get into the house. Counsel refused to grant defendant's motion but said he would consider the case for the fourth that he wanted defendant examined by Dr. Hinman. The case was then continued. Afterwards the case was again called and the jury was closed that the defendant had been examined by Dr. Hinman, who reported that he found the defendant "was sane". The jury then called the two witnesses who testified that they had met the defendant some time after the accident and had he stated that he shot Mike so that he could get sanitarily and get into the house.

At the conclusion of all the evidence the defendant's

counsel again moved that the defendant be discharged; the court over-ruled the motion and said: "I believe this boy to be a mental case and should be in an institution." He then found the defendant guilty and ordered him committed to the House of Correction for 60 days and imposed a fine of $25 and costs.

The statute under which defendant was prosecuted provides: "An assault with a deadly weapon *** with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears or where the circumstances of the assault show an abandoned or malignant heart shall subject the offender to a fine not exceeding $1,000 nor less than $25 or imprisonment in the county jail for a period not exceeding one year or both, in the discretion of the court." Sec. 25, (Par. 37), Chap. 38, Cahill's 1927 Statutes. In prosecutions for an assault with intent to commit bodily injury, the specific intent charged is the gist of the offense and must be proven as charged. People v. Connors, 253 Ill. 266.

In the instant case the information charged that the defendant assaulted John Mika wilfully and maliciously with a revolver, there being no provocation and under circumstances showing an abandoned and malignant heart, with the intent to inflict a bodily injury upon the person of Mika. It is obvious that all the evidence shows that there was no malicious intent, but on the contrary all the evidence shows that Mika was shot through an accident and the finding of the court was contrary to all the evidence. Just why defendant, who was referred to in the evidence as a boy, should have a revolver under his pillow we are unable to understand. We are clear that all the evidence shows that the finding and judgment are unwarranted, therefore the judgment of the Municipal court of Chicago is reversed.

REVERSED.

McSurely and Matchett, JJ., concur.

counsel again moves that the defendant be discharged, on merits over-ruled the motion and said: "I believe this to be a criminal case and should be in an institution." In order that the defendant guilty and ordered him committed to the house of correction for 60 days and imposed a fine of ten dollars.

The statute under which defendant was prosecuted provides: "An assault with a deadly weapon — with an intent, in the first case the person of another a bodily injury, shall be considered provocation appears or there has been a sufficient show an abandonment or malignant heart shall subject the offender to a fine not exceeding $1,000 nor less than $25 or imprisonment in the county jail for a period not exceeding one year or both, at the discretion of the court." Sec. 58, Ill. Crim. Ill. Smith's 1927 Statutes. In order to justify the jury in finding that to commit bodily injury, the evidence taken should be the plaintiff of the defendant and must be proven to exist. People v. Jackson, 325 Ill. 386.

In the instant case the information charges that the defendant assaulted John Kim with a deadly and dangerous weapon, with a revolver, there being no provocation and with intent to commit a bodily injury upon the person of said John Kim. It is obvious that all the evidence shows that there was no provocation given, but on the contrary all the evidence shows that Kim was most friendly to defendant and the finding of the defendant guilty by all the evidence. The fact that defendant, who was charged in the criminal court of Cook County, should have a revolver under his pillow — are matters of conjecture. We are clear that all the evidence shows that the defendant and the defendant, therefore the judgment of the criminal court of Cook County is reversed.

Reversed.

Moxley and Matchett, JJ., concur.

33136

CLARA BUSECKE,
Defendant in Error,

vs.

MAY CASEY and JAMES CASEY,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

252 I.A. 659

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages sustained by reason of a collision between her automobile and another alleged to be in the possession of the defendants, husband and wife, and operated by May Casey. Upon trial by a jury she had a verdict against both defendants for $400. Defendant James Casey by this writ of error seeks a reversal of the judgment thereon.

About one o'clock in the morning of August 22, 1925, plaintiff was driving her automobile south on Grand boulevard near the intersection of 47th street in Chicago. As she was crossing 47th street her car was struck by the automobile driven by May Casey coming from the west. It is conceded that the accident happened through the negligent management of the latter automobile. May Casey did not appear at the trial.

James Casey testified that the automobile driven by May Casey belonged to him; that she had no interest in the same; that from June 15 to September 13, 1925, he was confined as a prisoner in the DuPage county jail; that before this time his wife had never driven the automobile and did not know how to drive one; that before he went to jail he instructed her not to let anyone take the car out; that he put the car in a new garage, locked the door and carried the key with him; that when he returned on September 13th he found his wife gone and the car gone. He obtained a divorce from her on April 1, 1926. He did not see his wife on August 22nd and was not present at the time of the accident, but was in jail. He had never given her permission to drive his car

and never allowed her to do so. This evidence is undisputed.

Counsel for plaintiff says that it was shown that James Casey in December, 1925, signed a bail bond for his wife and that this with certain other facts tended to discredit James Casey's testimony. We do not so conclude. The incidents claimed to be discrediting are not inconsistent with the statements of the witness Casey as to the fact of his non-presence at the time of the accident and his explicit instructions that his wife should not remove the car from the garage. The verdict against James Casey is manifestly against the weight of the evidence.

But it is said that James Casey may be held either as a joint tort-feasor, citing Vanmeter vs. Gurney, 240 Ill. App. 165, or under the doctrine of respondeat superior, citing Barran v. Adanick, 251 Ill. App. 481. The decisions in these cases are not applicable to the present circumstances. In the Gurney case both the master and the servant were in the automobile at the time of the accident and it was held were jointly responsible for its operation. In the Barran case the automobile was driven by the admitted agent or servant of his principal, and it was held that under such circumstances the master and the servant could be joined in one action. In the instant case James Casey was not present at the time of the accident and it is amply proven that the automobile was removed from the garage not in connection with any family concern but in direct violation of his orders. In fact, the circumstances tend to support the contention that, while her husband was in jail May Casey stole the automobile and was using it for her own pleasure when her negligent operation of it caused the accident.

The court improperly instructed the jury upon the theory that, if it was shown that both May and James Casey owned the automobile as husband and wife, then both defendants were responsible. It was undisputed that the car belonged to James Casey alone. The

and never allowed one to do so. This evidence is unimportant.

Counsel for plaintiff made very little cross-examination of James Casey in December, 1951, although a full hour was taken up with cross-examination of witness Casey's testimony. He did not re-examine. The highways engineers to be discussing are not inconsistent with the testimony of the witness Casey as to the fact of his non-presence at the time of the accident and his explicit testimonies that his wife should not be move the car from the garage. The verdict against James Casey is manifestly against the weight of the evidence.

Not it is said that James Casey [illegible] be held liable as a joint tort-feasor, citing Fabricius vs. Gunning, 32 III. App. 438, or under the doctrine of respondeat superior, citing Thomas vs. Adamian, 291 III. App. 402. The decisions in these cases are not applicable to the present circumstances. In the Gunning case the driver and the owner were in the automobile at the time of the accident and it was held to be jointly responsible for the operation. In the Thomas case the automobile was driven by the assistant agent at request of his principal, but it was held that under such circumstances the master and the servant could be joined in one action. In the instant case James Casey was not present at the time of the accident and it is amply proven that the automobile was removed from the garage not in order to [illegible] own but in direct violation of his orders. In fact, the circumstances tend to support the contrary fact. Mrs. Casey testified she in fact had Casey state to automobile and she could if for her own pleasure was for personal convenience of it owner the assistant.

The court improperly instructed the jury upon the theory that, if it was shown that both Jay and James Casey owned the automobile in question and with, then both defendants were responsible. If the undisputed fact the car belonged to James Casey alone. The

jury was also improperly instructed that if it should find that James Casey owned the car and that May Casey on the night of the accident was engaged in some occupation or errand for and on behalf of James Casey, then it could find James Casey guilty of any negligence of which May Casey was guilty. There was no evidence to justify this instruction. We can conceive of no correct rule of law which under the circumstances appearing in evidence would justify a verdict against James Casey.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

jury was made improperly inadequate that it is doubtful that James Casey would die now and that any doubt on the subject of the accident was argued in some detail in order to set at rest the fair of James Casey, also it would also have been making of any implication which May Casey was guilty. There was no evidence to justify this instruction. The sum according to the proper rule of law which under the circumstances prevailing in Oklahoma would justify a verdict against Jesse Casey.

For the reasons above indicated the judgment is reversed and the cause remanded.

Robinson, J.C. concur.

O'Neal, P. J., and McCarty, J., concur.

33188

JOHN S. CRAIN,
Appellee,

vs.

CHICAGO & NORTHWESTERN
RAILWAY COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 659

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment against it entered on the verdict of a jury for $1172.75 in an action brought to recover for alleged damages to a carload of horses shipped from Arlington Heights, Illinois, to Atlanta, Georgia. The car traveled over lines belonging to a number of railroads, but the defendant is the initial carrier and under the Carmack Amendment to the Act to Regulate Commerce may be sued under such circumstances. Plaintiff claims that the horses were damaged on account of rough handling in transit.

As there must be another trial we refer only briefly to the evidence on the facts. November 13, 1925, plaintiff tendered defendant for shipment a carload of 24 horses and 4 mules to be hauled to Atlanta, Georgia. The horses were ordinary farm horses; the car was a 40 foot car, loaded by the shipper, who accompanied the car from the stockyards in Chicago as far as Nashville, Tennessee. The evidence as to the rough handling narrows down to the stage of the journey from Terre Haute to Evansville, Indiana, a distance of about 111 miles, and the evidence as to this is conflicting. Plaintiff was the only witness who testified that the train was roughly handled between these points. His testimony was contradicted in some particulars and there was other evidence tending to cast doubt upon his statements.

There was considerable evidence tending to show that the car was overcrowded. Many witnesses testified that a 40 foot

JOHN S. CLARK,
Appellee,

vs.

CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY,
Appellant.

Mr. Justice Gemmill delivered the opinion of the court.

Judgment by trial court, sitting without a jury, against appellant in amount of two thousand on a per diem contract in an action brought to recover for alleged damages of a minor in behalf obtained from Adjustor Baldwin, Illinois, in Illinois, Illinois. The car travelled two miles following by a number of miles, for the defendant. In the initial carried and under the direct jurisdiction of the act to regulate commerce may be used interchangeably. Plaintiff claims that the errors were brought on account of their benefits in transit.

As there must be another trial we refer only briefly to the validity of the claim. October 11, 1933, plaintiff tendered for delivery for shipment a carload of 24 cattle and 4 mules to be hauled to Atlanta, Georgia. The bonded cars railway time bonded; the car was a 40 foot car, loaned by the shipper, was accompanied the car from the stockyards to Chicago as far as Danville, Indiana. The evidence is in the usual conflict between the claim of the journey that began that it to Evansville, Indiana, a distance of about 112 miles, and the evidence is to this is conflicting. Plaintiff was the only witness who testified that the truck was usually loaded between some points. His testimony was corroborated in some particulars and there was other evidence tending to sway doubt upon the testimony.

There was conflicting evidence tending to show that the car was overcrowded. Some witnesses testified that a 40 foot

car can hardly hold 24 horses and 4 mules and that such overloading is objectionable because, if an animal falls down it is almost impossible for him to rise again.

There was also a conflict in the testimony as to the condition of the horses when they were shipped, some witnesses testifying that they were "in pretty fair condition," while other witnesses said that they were decrepid. The waybill recites that the horses were all aged and rough, 7 to 16 years old.

It was important under such circumstances that the jury be correctly instructed. The court, at defendant's instance, instructed the jury that, where the shipper loads the livestock and in doing so overcrowds the animals, the risk or loss is upon the shipper. (Instruction No. 1.) Spence v. ElPaso & South Western Co., 28 N. M. 132; I. C. R. R. Co. v. Rogers & Thomas, 162 Ky. 535; Libro v. C. C. C. & St. L. Ry. Co., 202 Ill. App. 418.

The bill of lading specifically provided that, unless the shipment was damaged by reason of the negligence of the carrier or its employees, the carrier would not be liable for injury sustained by the livestock which was caused by overloading or crowding one upon another. However, the court erroneously, at the instance of plaintiff, gave instruction number 24 as follows:

> "The jury are instructed that where live stock such as are in question in this case are received by a common carrier, and a receipt or bill of lading is given containing a clause exempting the carrier from certain liabilities therein mentioned, such receipt or bill of lading is not binding on the shipper unless it appears by a preponderance of the evidence, that he knew of and assented to the exemption; or whether he did so assent is a question of fact for the jury."

As this shipment was concededly interstate, it was erroneous to charge the jury in accordance with the Illinois rule concerning the shipper's assent to limitations in bills of lading. Adams Express Co. v. Croninger, 226 U. S. 491; M. K. & T. Ry. Co. v. Harriman, 227 U. S. 657; K. C. S. Ry. Co. v. Carl, 227 U.S.639; Gamble-Robinson Commission Co. v. Union Pacific R.R.Co., 262 Ill.

our own merely hold it horses and guides and just not, over-riding is objectionable process, it is [illegible] is to choose improperly, not the law so.

There was also a condition in the instrument as to the condition of the horses when they were entire, some witnesses stating that they were "in pretty fair condition," while others essays said they were neutral. The opposed evidence that the horses were all dead on arrival, ? on 12 years old.

At the beginning being [illegible] that the jury be correctly instructed. The court, in instructing [illegible], directed the jury that, where the [illegible] in driving an in [illegible] as overcome the animals, the risk is less in [illegible] animal. (Instruction No. 1.) [illegible] 20 N. W. 128; [illegible] [illegible]

The fact of letting [illegible] the animal was taken by reason of the [illegible] or its employee, the carrier would not be liable [illegible] taken by the [illegible] which was caused by [illegible] or [illegible] the driver. However, the [illegible] of plaintiff, gave [illegible]:

> "The jury are instructed that [illegible] in question in this case was negligence by a [illegible], and a reckless or risk of liking in [illegible] the carrier from certain liability [illegible] case of risk or liking is not [illegible] or the driver [illegible] proximate of the [illegible], [illegible] question of fact for the jury."

In this [illegible] [illegible] to charge the jury in accordance [illegible] [illegible] the plaintiff's [illegible] [illegible] Alpha Express Co. v. Dreyfuss, 146 U. S. 49; [illegible] v. Hartman, 47 U. S. 497; [illegible] v. Lent, 107 U. S. 450; Cowgill-Robinson Commission Co. v. Union Pacific R. R. Co., 84 [illegible].

400; J. C. Shaffer & Co. v. C. R. I. & P. Ry. Co., 185 Ill. App. 615; Sweetser v. C. & A. R. Co., 196 Ill. App. 623; Shellabarger Elevator Co. v. I. C. R. R. Co., 212 Ill. App. 1; T. & P. Ry. Co., v. Leatherwood, 250 U. S. 478. Furthermore, this instruction ignores the rule that, if the injury is caused by overloading and not caused by the carrier's negligence, the carrier is not liable.

The court also improperly gave, at plaintiff's request, instruction number 34 as follows:

> "The court instructs the jury that the loading and unloading of cars are presumed to be under the carrier's control and that the carrier is liable for any loss incident thereto, unless the shipper assumes the responsibility, and then only if the defects in loading could not have been readily seen by the carrier under ordinary observation and inspection.
>
> "And in this case if you find from the evidence that the defendant knew or could have known of the defects, if any, in the loading by reasonable observation or inspection, then, even if the shipper assisted in the loading of the horses, the defendant would be liable."

This instruction is inconsistent with given instruction number 1. The evidence shows that the shipper exclusively had charge of loading the livestock in the instant case. Furthermore, we can not concede that the law is that even where a shipper has exclusive charge of loading the livestock, if the defendant knew or could have known of the overloading by reasonable observation or inspection, then the carrier would be liable. In I. C. R. R. Co. v. Rogers & Thomas, 162 Ky. 535, the rule was stated to the contrary, although noting that "there are a few respectable authorities holding the contrary view." The opinion concludes, however, that

> "The great weight of authority supports the proposition that where the shipper loads the car himself, the carrier is not liable for loss or injury arising from such defective manner of loading, whether the same be discoverable or not, if not actually discovered by the carrier. The carrier has a right to assume that the shipper has loaded the car in proper manner; and it does not lie in the mouth of a shipper whose act or fault in respect to the manner in which he loaded the car has resulted in loss or injury to his property, to say to the carrier that it might have discovered such improper loading by an inspection. The shipper may not thus derive advantage from his own wrong."

Other supporting cases are Texas & P. Ry. Co. v. Eddins,

[illegible] v. [illegible], 186 Ill. 184. [illegible] v. [illegible], 172 Ill. App. [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible]; [illegible]. Furthermore, this instruction ignores the rule that, if the injury is caused [illegible] by the shipper's negligence, the carrier is not liable.

The court also gave [illegible] at the plaintiff's request, instruction number 14 as follows:

> "The court instructs the jury that the loading and unloading of cattle are presumed to be under the control of the carrier [illegible], unless the shipper assumes the responsibility, and not even if the defects in loading could not have been readily seen by the carrier upon ordinary observation and inspection.
> "And in this case if you find from the evidence that the defendant knew or might have known of the defects, if any, in the loading by reasonable observation or inspection, then, even if the shipper assisted in the loading of the cattle, the defendant would be liable."

This instruction is inconsistent with given instruction number 1. The evidence shows that the shipper voluntarily had charge of loading the livestock in the initial case. Furthermore, we do not concede that the law is that even where a shipper has exclusive charge of loading the livestock, if the defendant knew or might have known of the overcrowding by reasonable observation or inspection, then the carrier would be liable. In [illegible], Rogers v. Jones, 105 [illegible] 121, the court was divided as to the majority, although holding that "there are a few respectable authorities holding the contrary view." The minority holds, however, that:

> "The great weight of authority supports the proposition that where the shipper loads his own livestock, the carrier is not liable for loss or injury arising from such defective method of loading, unless the same is observable or [illegible], or was easily discovered by the carrier. The parties have a right to assume that the shipper has loaded the car in proper manner; and it does not lie in the mouth of a shipper [illegible] in consent to the manner in which he [illegible] loss of injury to his property, to say to the carrier that it might have discovered such improper loading by an inspection. The shipper may not thus secure advantage from his own wrong."

Other supporting cases are: [illegible]

36 Tex. Civ. App. 638; Ficklin & Son v. Wabash Ry. Co., 115 Mo. App. 633; Morse v. Canadian Pacific Ry. Co., 97 Me. 77. This principle has been applied in a shipment of iron trusses in Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645.

It was also improper to give plaintiff's tendered instructions numbers 8, 14 and 15. The eighth instruction told the jury that the carrier was an insurer without any qualification as to the rule that exists in the case of livestock. It also improperly referred to the duty of the carrier to provide a safe car; there was no claim either in the pleading nor in the evidence that there was anything the matter with the car furnished. The 14th and 15th instructions are also open to the criticism that they fail to include the rule that, in the case of livestock the carrier is not liable where it has proven freedom from negligence. We are not referred to any case holding that the carrier of livestock is an absolute insurer except as against its own negligence. These cases hold to the contrary: C. R. I. & P. Ry. Co. v. Harmon, 12 Ill. App. 54; Adams Express Co. v. Bratton, 106 Ill. App. 563; Wabash R.R.Co. v. Johnson, 114 Ill. App. 545; North Pa. R. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727. This rule was also stated in an ancient case where the property transported consisted of slaves, opinion by Chief Justice Marshall, -Boyce v. Anderson, 2 Peters 150 (U. S. Sup. Ct.)

Defendant claims prejudicial error in the conduct of counsel for the plaintiff. A considerable portion of defendant's evidence was in the form of depositions of some twenty-one witnesses taken along the route traveled by the shipment. These depositions were taken in the regular way pursuant to the statute, but plaintiff did not appear at the taking of them. No objection was made prior to the trial as to their form nor was any objection made based on any ground of failure to comply with the law applicable to the taking

[illegible]

[illegible]

[illegible]

of depositions. During the trial, however, plaintiff's counsel by many statements sought to discredit these depositions on the ground that there was no cross-examination, "that everything is simply one-sided; * * * you only take one side of the story and let them put in a lot of testimony which I never saw." Again plaintiff's attorney stated, "We did not know a single thing about it, nobody was present, not a single one to hear the testimony of any one of the witnesses on the stand." Again, "I think it wasn't fair to the plaintiff to let all this testimony in, in view of the testimony of the plaintiff that was excluded." And again the depositions were referred to as "all kinds of stuff." There were also further remarks charging that defendant's counsel had the depositions in his exclusive possession. Although admonished severely by the trial court to refrain from making such statements in the presence of the jury, plaintiff's counsel still persisted even when the court indicated that, if the attorney was not more careful the court would declare a mistrial. Also in argument counsel for the plaintiff referred to the plaintiff as "not a rich man; he is an ordinary farmer," and stated that the defendant had means to send "around agents and investigators all over the country," and that it did this "in order to suppress this claim, in order to defeat justice." Such statements are clearly prejudicial and require a reversal. Westbrook v. Chicago & North Western Ry.Co., 248 Ill. App. 446.

We can find no justification in the record for the amount of the verdict rendered - $1172.75. Plaintiff undertook to testify as to the market value of such horses at their destination in Atlanta, Georgia, but did not qualify as an expert in this respect. He said he knew this value "by experience" although he had not been in Atlanta since the World war. He said he felt that "the lot of horses ought to net me $2500; that is just what I figured." There was an abundance of testimony by witnesses, residents of Atlanta, that the sale of

of depositions. During the trial, however, plaintiff's counsel by many statements sought to discredit these depositions on the ground that there was no cross-examination. "This deposition is simply one-sided; . . . you only have one side of the story and [illegible] through in a lot of testimony which I never saw." Again plaintiff's attorney stated, "We did not have a single thing about it, nobody was present, not a single one to hear the testimony of any one of the witnesses on the stand." Again, "I think it wasn't fair to the plaintiff to let all this testimony in, in view of the [illegible] that [illegible] was excluded." And again the depositions were referred to as "all kinds of stuff." There were also further remarks wherein that defendant's counsel had the depositions in his [illegible] possession. Although admonished severely by the trial court to refrain from making such statements in the presence of the jury, plaintiff's counsel still persisted even when the court indicated that, if the attorney was not more careful the court would declare a mistrial. Also in argument counsel for the plaintiff referred to the defendant as "just a rich man; he is an ordinary [illegible]," and stated that the defendant had enough to make "[illegible] goods and [illegible] all over the country," and that it did "this [illegible] to [illegible] this [illegible], in order to defeat justice." Such statements are clearly prejudicial and require a reversal. [illegible] v. [illegible], 248 Ill. App. 385.

We can find no justification in the record for the amount of the verdict rendered - $[illegible]. Plaintiff testified he [illegible] as [illegible] of [illegible] in Atlanta, Georgia, [illegible] of [illegible]. He said he [illegible] had a value "by [illegible]" although it had not been in Atlanta since the [illegible] war. He said [illegible] that "the [illegible] of [illegible] ought to [illegible]; that is just what I claimed." There was no evidence of testimony of witnesses, [illegible] of [illegible], and the sale of

horses had fallen off as compared with the sale of mules and that there was no demand for horses of this class. Mr. Patterson, residing at Atlanta, testified that he was in the livestock business since 1904; that his concern was one of the largest in Atlanta and that he was engaged in the handling of all kinds of livestock, selling horses and mules weekly at auction and private sales daily; that he handled about 15,000 horses and mules during the course of a year; that he was familiar with conditions regarding horses in Atlanta and that there was a sale of about one horse to forty or fifty mules. There is no publication covering the market of horses in Atlanta. The witness had a personal recollection of the shipment in question and sold the same for the plaintiff. The horses were delivered to the Patterson unloading sheds. He said there were a few horses and mules that were bruised up some, one especially that had been down in the car; that "it was a load of peeked, plain second-hand horses and mules," and that the "type of horses in this load does not suit the Atlanta market;" that his recollection was that the six injured horses were sold privately, and "the market value was realized on the balance of the shipment" which was sold by auction and handled in the regular course of business. Another Atlanta witness of experience testified that the horses were old, thin, disabled and worn out, they "simply were a worn out set of animals." Another qualified Atlanta witness testified that the horses were "practically of no market value, being old, thin and practically worn out." There was much other evidence of the same sort. The horses brought at the sale in Atlanta $466. As there was no proof of any market value for such horses in Atlanta, the presumption is that the market value is what they brought.

For the errors above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

33306

W. MOORE THOMPSON and
W. A. NEWMAN LOVELAND,
Appellees,

v.

JACOB GROSSMAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

252 I.A. 659

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against him entered upon the finding of the court for $1695.82. The points raised arise on the pleadings.

The statement of claim alleges that in a foreclosure proceeding in the Circuit court of Cook county brought by plaintiffs a bond was given, signed by the Ashland Boulevard Hospital as principal and Jacob Grossman as surety, in the amount of $3,000, in lieu of the appointment of a receiver of the Ashland Boulevard Hospital. The bond was conditioned that, in the event a decree should be rendered against the hospital for the payment of money, the bond should stand as security for the same; that a decree was entered in the foreclosure proceeding finding due $2170.20; that the Ashland Boulevard Hospital paid on account of this $600, leaving a balance due of $1570.20, which, with interest, makes a total amount due of $1695.82.

Defendant on this appeal raises many points which, upon the state of the record, cannot be reviewed. It is said that the Municipal court did not have jurisdiction of the foreclosure proceedings but this is an action in debt on a written instrument of which the Municipal court clearly has jurisdiction.

[illegible]

W. [illegible] and
W. [illegible],
Appellees.

v.

[illegible] and [illegible],
Appellant.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from a judgment against the defendants upon the finding of the court, for $[illegible]. The primary issues arise on the pleadings.

The statement of claim filed [illegible] in a [illegible] proceeding in the circuit court of [illegible] County to plaintiffs a bond was given, signed by the [illegible] principal as principal and [illegible] as surety, in the amount of $[illegible], in lieu of the appointment of a receiver of the [illegible] Realtors [illegible]. The bond was conditioned that, in the event a decree should be rendered against the [illegible] for the payment of money, the same should [illegible] as security for the same; that a decree was entered in the foreclosure proceeding [illegible] $[illegible]; that the [illegible] realized [illegible] on account of this [illegible], leaving a balance due of [illegible], with interest, under a [illegible] decree of [illegible].

Pleadings on this appeal raise four points, [illegible] upon the state of the record, [illegible] to consider. It is [illegible] that the municipal court did not have jurisdiction of the [illegible] phase which [illegible] in an action in tort on a written instrument of which the municipal court already has jurisdiction.

The statement of claim alleges that Dr. W. A. Newman Dorland is the bona fide owner of the claim, and defendant asserts that the assignment is not properly pleaded, as required by section 18, chapter 110, Practice Act. The assignment to Dorland is properly pleaded in the statement of claim, which is under oath, and a copy of the assignment is attached.

Judgment might well have been entered for want of a sufficient affidavit of merits, which in general terms alleges that defendant neither admits nor denies that defendant is indebted to plaintiff but calls for strict proof thereof.

The record shows no objections to any of the proceedings nor to the judgment, so the defendant cannot now for the first time question the same. Lange v. Stack, 199 Ill. App. 538; Harmon v. Callahan, 187 Ill. App. 312; Reid v. McKinney, 202 Ill. App. 129; Knudsen v. Helmick, 207 Ill. App. 98.

It is suggested that the form of the judgment is erroneous. This may be conceded and for this reason the judgment will be reversed, but as the case was tried by the court a proper judgment will be entered in this court against the defendant for $3,000 debt to be satisfied upon the payment of $1695.82 awarded as damages. The costs of this appeal will be taxed against the appellant.

REVERSED AND JUDGMENT HERE.

O'Connor, P. J., and Matchett, J., concur.

The statement of claim alleges that [illegible] Holmes Dorland is the bona fide owner of the claim, and appellant asserts that the assignment is not properly pleaded, as required by section 18, chapter 110, Practice Act. The assignment to Dorland is properly pleaded in the statement of claim which is under oath, and a copy of the assignment is attached.

Judgment might well have been entered for want of a sufficient affidavit of merits, which in general terms alleges that defendant neither admits nor denies that defendant is indebted to plaintiff but calls for strict proof thereof.

The record shows no objections to any of the proceedings nor to the judgment, so the defendant cannot now for the first time question the same. Dewey v. [illegible], 189 Ill. App. 390; Bergen v. Callahan, 197 Ill. App. 112; [illegible] v. [illegible], 204 Ill. App. 157; Robinson v. Schmidt, 207 Ill. App. 30.

It is suggested that the form of the judgment is erroneous. This may be conceded and for this reason the judgment will be reversed, but as the case was tried by the court a proper judgment will be entered in this court against the defendant for $[illegible], to be predicated upon the payment of [illegible] damages. The costs of this appeal will be taxed against the appellant.

REVERSED AND JUDGMENT HERE.

O'Connor, P. J., and McSurely, J., concur.

33349

S. BAER,
Appellee,

vs.

METROPOLITAN PETROLEUM COMPANY, a Corporation, and NAT RUE,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

252 I.A. 660

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Judgment for $562.50 was entered by confession against defendants by virtue of a power of attorney contained in a judgment note. The note, dated April 27, 1928, was payable to the order of J. L. Herman for $500, due six months after date, and signed by Metropolitan Petroleum Co. by Israel B. Zimmerman; Nat Rue also signed it. J. L. Herman endorsed the note and November 2, 1928, judgment was entered. Defendants moved to vacate the judgment, supporting the motion by petitions and affidavits. After hearing the motion was denied, from which order defendants appeal.

While the petitions assert that the note was given without consideration, yet it appears therein that J. L. Herman was a stockholder of the defendant company, which company was the result of a consolidation of two companies, namely, Metropolitan Petroleum Company and Metropolitan Service Stations, Inc.; that the Metropolitan Petroleum Company was under the impression that stock of the Metropolitan Service Stations, Inc., could be sold after the consolidation and sold blocks of stock of the consolidated company to divers persons who filed complaints before the Securities Commission demanding restitution for the unqualified stock they had purchased; that Julius Herman had purchased some of this stock and filed a complaint with the Securities Commission, whereupon the complaints of the purchasers of the unqualified stock were determined to the satisfaction of all the parties and the Securities Commission ordered that,

unless the defendant Metropolitan Petroleum Company made a settlement with Herman, certain proceedings would not be dismissed; thereupon Zimmerman, the president of the defendant corporation, and Nat Rue, the secretary, agreed to take back the certificates of stock aggregating the sum of $1500, for which they agreed to execute three promissory judgment notes in the sum of $500 each, which notes were executed and delivered. One of these notes is the basis of this suit. It also appears from the petition that the board of directors of the defendant corporation consisted of three directors and that at the time the note in question was executed there were present Israel Zimmerman and Nat Rue, being the president and secretary respectively. These persons were also directors of the company at this time.

It is contended that on the face of the note Zimmerman and Rue signed only as officers of the corporation and that this being manifest, the note must be considered as the note of the corporation and not as the note of Nat Rue individually; but the note on its face shows that Nat Rue signed in his individual capacity only and not as an officer of the corporation.

Where an instrument on its face represents an absolute individual obligation, parol evidence will not be received to vary the terms of the written instrument, and where a note is signed by an individual without any words indicating that it is signed in any other capacity, the obligation thereby incurred is individual. In Hypes v. Griffin, 99 Ill. 134, it was held that, when the note was signed by the defendant in his individual capacity, his undertaking was absolute and that oral testimony would not be admitted for the purpose of showing that he did not intend to incur any personal liability. The court said:

unless the defendant Metropolitan Detention Center could a satisfactory with Tarman, certain procedures would be disciplinary consideration, the creation of the Bureau of Prisons, and the secretary, agreed to take, keep the certificate of work according the month of 1000, for which time period to commence inter-prison disciplinary action in the use in this case, which were executed and delivered. One of these dates is the state of the suit. It also arises from the petition and the terms of statutes of the internal correspondence concerning of force transfers and the at the time the move to prevent the associated inmate was transferred Tarman, and by the, being the prejudicial and mandatory inactivity. These matters have also jurisdiction of the inquiry of this time.

It is contended that on the face of the state statutes and has alleged such as evidence of the information and that this being material, it has been established as the date of the operation and not on the date of the time indefinitely; but the time on its face shows that it was alleged in the initial complaint only and not as an affect of the transportation.

Where an inmate on its face concerns or accurate individual objection, based evidence will not be required in any the terms of the relevant statutes, and where a date is alleged by an individual without any words qualifying that it is stated in any other capacity, the obligation thereby imposed is definitive. In Ryman v. Smith, 98 III. 124, in the case date, when the date was alleged by the defendant in his individual capacity, the contention was dismissed and that any such testimony would not be conclusive for purposes of showing that he did not intend to assume any personal liability. The court said:

"Whatever may be the decisions elsewhere on analogous questions, the authorities in this State are full to the point that a party will not be permitted to show by oral testimony that his written agreement was not, in fact, to be binding on him. ***

"The makers of this note chose to bind themselves individually, under their hands and seals, without the use of any apt words in the agreement to bind the corporation of which they were trustees. Had it been the intention to charge the corporation exclusively, we must understand the agreement would have been expressed in the writing to that effect at that time. 1 Greenlf. Ev., Sec. 275; 2 Kent. Com. 746."

The case of Scanlan v. Keith, 102 Ill. 634, followed this distinction, holding that where the signers of the note had signed using apt words of descriptio personae, the obligation was that of the corporation. No cases are cited holding that, where the signature to a note is that of the individual without any words indicating any other capacity as a signer, he is not bound thereby personally.

While it is true the petitions allege lack of consideration, yet the facts set out in the petitions show the contrary. Defendant corporation had sold J. L. Herman certain stock which the Securities Commission had declared unqualified, and it was in settlement of this matter that the notes in question were given.

Officers of the corporation have the power to execute judgment notes for the corporation, where such power is implied from all the facts and circumstances surrounding the transaction. State Bank of East Moline v. Moline Pressed Steel Co., 283 Ill. 581; Atwater v. American Exchange National Bank, 152 Ill. 605. Other cases also so hold.

Defendants assert that an agreement by a corporation to buy its own stock cannot be enforced when the solvency of the corporation is in question; citing Olmstead v. Vance & Jones Co., 196 Ill. 236. This case is not in point, for there creditors of the corporation were questioning the validity of the sale. The rights of creditors are not involved in the instant matter. So long as creditors are not questioning the transaction, we cannot

> "Whatever may be the conflicting authorities on analogous questions, the authorities in this State are uniform to the point that a party will not be permitted to show by oral testimony that his written agreement was not, in fact, his [illegible] at all. [illegible]

> "The makers of this note chose to bind themselves individually, under their hands and seals, without the use of any word that [illegible] in the agreement to bind the corporation of which they were trustees. Had it been the intention to charge the corporation exclusively, we must infer that the agreement would have been expressed in the writing to that effect at that time. 1 [illegible] Sec. 379; 2 Kent, Com. 630."

The case of [illegible], 107 Ill. 454, follows this distinction, holding that where the signers of the note signed using not words of [illegible], the obligation was that of the corporation. The cases were cited holding that, where the signature to a note in name of the individual without indicating any other capacity as a signer, it is not bound thereby personally.

While it is true the petition alleges none of ratification, yet the facts set out in the petition show the [illegible] corporation had sold to W. L. Warren certain [illegible] which the [illegible] had declared forfeited, and it was in [illegible] of this transaction that the note in question was given.

Officers of the corporation have the power to execute judgment notes for the corporation, where such power is implied from all the facts and circumstances surrounding the transaction. First Nat. Bank of East St. Louis v. [illegible], 88 Ill. 644; [illegible] v. [illegible], 288 Ill. 604. [illegible]

Defendants assert that an agreement by a corporation to buy its own stock cannot be enforced when the solvency of the corporation is in question; citing [illegible] v. [illegible], 298 Ill. 520. This case is not in point, for there creditors of the corporation were questioning the validity of the sale. The rights of creditors are not involved in the instant matter, so long as creditors are not questioning the transaction, we cannot

see any basis for the corporation to maintain any claim that it had no right to sell stock.

There is no merit to the point that plaintiff in his cognovit exceeded the power granted in the warrant of attorney in agreeing that no writ of error or appeal should be prosecuted on the judgment. The plaintiff is not questioning the right of the defendants to appeal. While it is the general rule that all warrants of attorney will be strictly construed - Keith v. Kellogg, 97 Ill. 147, - this case also holds that this rule has its reasonable limitations and must not be applied so rigidly as to defeat the manifest intentions of the parties to the instrument. This was also the holding in Holmes v. Parker, 125 Ill. 478.

We can see no reasonable grounds for reversal and the order is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

32942

EDMUND O. BILL and
ALBERT ROSENFIELD,
Appellants,
vs.
ISAAC GITTLER,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

252 Ill. 660

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This writ was sued out by the plaintiffs to secure the reversal of a judgment entered in favor of the defendant upon the verdict of a jury after a motion for a new trial had been overruled.

The suit was in assumpsit upon an alleged oral promise by defendant to pay commissions to plaintiffs for their services in securing a purchaser of the Southmoor hotel. The original declaration consisted of three counts. Later four more counts were added, to which the common counts were attached. Plaintiffs filed a bill of particulars. Defendant pleaded the general issue and gave notice of special defenses.

It is urged for reversal that the verdict is against the manifest weight of the evidence; that defendant was permitted to introduce incompetent and irrelevant evidence; that the court and counsel for the defense made prejudicial remarks in the presence of the jury, and that the court erred in the giving and refusing of instructions.

At the time of the occurrences which are in dispute the legal title to the Southmoor hotel was in the Keltig Building corporation. In the beginning the suit was brought by Peter J. DeVoney and Edmund O. Bill as copartners, doing business as DeVoney, Bill & Company, and Albert Rosenfield. Pending the suit DeVoney died. Thereafter it was prosecuted by Bill as the surviving partner, and Albert Rosenfield jointly.

The Southmoor hotel is situated on the west side of

Stony Island avenue and extends from 66th place to 67th street in Chicago. Defendant Gittler owned practically all the stock of the corporation, but the stock was in fact held by Edward I. Bloom as collateral to secure a loan. The Reltig corporation was capitalized for $700,000. The land upon which the hotel was built originally belonged to Bloom. The stock of the corporation was paid for in cash and the cash was deposited in the Stony Island Trust & Savings Bank, of which Bloom was a director.

The property was encumbered by a first mortgage for $2,500,000 held by Straus Bros., and by a second mortgage for $500,000 held by Mandel Bros. The corporation also owed Mandel Bros. on an open account approximately $80,000 and had other liabilities in the way of accrued taxes and assessments, interest upon its first mortgage bonds, etc. Defendant Gittler was nominally the owner of this hotel; financially, however, he was obligated to Bloom with whom he advised from time to time. In January 1925, Bloom advised him to sell and he was not slow in accepting the advice. He listed the property with many real estate dealers and brokers. William B. Smith was then the manager of the hotel, holding that position from January 29 to September 15, 1925. He testifies that he was to receive extra compensation in case the hotel was sold. While Smith was manager defendant had a room on the second floor of the hotel.

Harry J. Stoops represented some eastern people who had been interested in the purchase of hotels. He had acquired the Marlborough and St. Giles hotels and at the time was living at the St. Giles; he had offices at 39 South LaSalle street; his health was not good and during at least a part of the time he was absent from Chicago and practically all the time was in the care of a nurse.

There is a sharp conflict in the evidence. The plaintiff Rosenfield testifies that he met the defendant at the South-

story lacked events and drama. The book dives in often except in Chicago. Dalenbaugh Gillior owned practically all the stock of the corporation, but the week he in that held by Edward I. Bloom on mortgated to secure a loan. The Bolling corporation was capitalized for $750,000. The land upon which the hotel was built actually belonged to Bloom. The stock of the corporation was sold for in cash and the cash was deposited in the Union Island Trust & Savings Bank, of which Bloom was a director.

The property was condemned by a first mortgage for $2,500,000 held by Atkins Bros., and by a second mortgage for $500,000 held by Adams Trust. The corporation also owed Bloom. on an open account approximately $8,000 for his usual liabilities in the form of unpaid rooms and accommodations, interest upon the first mortgage bonds, etc. Dalenbaugh Gillior was nominally the owner of the hotel; financially, however, he was dependent on Bloom who could be expected from time to time. In January 1892, Bloom advised him to sell and he was not slow in accepting the advice. He listed the property with many real estate dealers and brokers. Within a month was then the owner of the hotel, holding that position from January 31 to September 15, 1892. He testifies that he had to provide extra accommodation in order the hotel was full. While Gillior was manager Edwards was a type of the second floor of the hotel.

Mary C. Bloom testifies that Gillior always seemed to be in financial difficulties. He and Edwards the bartender, and Mr. Gillior seemed to be like two living at the St. Gillior borrowed money at 3 percent interest; his health was not good and during at least a part of the time he was absent from Chicago and practically all the time was in the care of a nurse.

There is a more material in the evidence. The plaintiff Mary Bloomfield testified that in her estimation of the property

moor hotel in February, 1925, and discussed with him there the question of obtaining a purchaser. Rosenfield says he told defendant that he had a friend named Edmund C. Bill who was a member of the firm of DeVoney, Bill & Company; that this firm had a clientele of hotel people and that he would like to bring Bill to see defendant. He says pursuant to that conversation he took Mr. Bill to the hotel in the early part of February and introduced him to defendant; that defendant and Bill conversed about matters concerning the financial condition, etc., of the hotel; that defendant procured statements as requested by Bill from the manager and handed them to Rosenfield, together with a circular issued by Straus Bros. Rosenfield testifies that at this interview defendant said: "Whoever you may bring in and be interested in, I guarantee you a 3% commission on the sale of $4,500,000, no matter what kind of a deal I make;" and that defendant further said, "You need not worry about your commission as you know that I always pay commissions to brokers, which this is my business and has been and I never try not to pay commissions or to beat anybody out of commissions; all you have to do is to go out and put all your efforts and your time and everything that is possible as I am ready and willing and must sell at the present time, that hotel." Rosenfield says Bill was present and that they asked an exclusive agency for the sale of the hotel, which defendant refused to give; that he, Rosenfield, then asked defendant how plaintiffs were to be protected in the matter of commissions and defendant replied in substance that when Rosenfield had a prospective buyer he should write defendant a letter to that effect; that he, defendant, would keep the letter in his files and would guarantee them if anyone else or any other broker would submit the same party he would never do any business with him and would tell him that this party had already been submitted to him by Mr. Rosenfield and Mr. Bill.

Plaintiff Bill also testifies to this conversation, corroborating Rosenfield in detail. He says defendant said, "No matter if we get together and I make the deal if I (you) furnish the parties I will pay you a commission of 3 per cent on $4,500,000." He also says that he accepted the proposition by replying, "I will do that." Plaintiffs testify further that they called on Stoops at his office the latter part of March, 1925, and presented the Southmoor proposition to him; that he told them he was interested in buying hotels for a syndicate and requested a more particular statement; that they obtained such statement from defendant in his own handwriting; this statement or a copy of it they caused (as they say) to be mailed to Stoops.

Plaintiffs also testify that when they secured this further statement they submitted to defendant the name of Stoops as a prospective buyer and asked defendant whether he knew Stoops and whether the name Stoops had been submitted to him; that defendant said he would look in his files, which he did and replied that plaintiffs were the first to submit the name of Stoops. They both testify that Bill then said, "Well, don't forget, Mr. Gittler, he is my client and I want the commission in case of a sale," to which Gittler replied, "You write me to that effect."

Plaintiffs also give evidence tending to show that on April 3, 1925, DeVoney, Bill & Company wrote defendant -

> "This is to inform you that yesterday we submitted your Southmoor Hotel to Harry J. Stoops, of 29 South LaSalle street, and who now owns a chain of hotels in the city of Chicago. Mr. Stoops is very much interested, and we are today submitting him a statement of your property. Will keep you informed as the negotiations proceed."

A copy of this letter was offered in evidence, and Miss Jurczak, who was then a stenographer in the office of DeVoney, Bill & Company, testifies that she typed and mailed the letter; that a letter was also mailed to Stoops on the same day. Mr. Bill testifies that Stoops afterwards, in a conversation by 'phone, admitted that

he had received his letter.

Plaintiffs further testify that Stoops made an appointment to meet them at the hotel for the purpose of examining it; that Stoops kept the appointment and was shown through the hotel by the manager, who was accompanied by the defendant.

Bill and Rosenfield further testify that in the conversation at Stoops' office, Stoops told them that he would have to go down East to see his associates, and Mr. Bill says that Stoops after looking the hotel over said he was interested but didn't have sufficient funds; that he would have to go east to get funds and that it would take him three or four or maybe five or six months before he would be in a position to go ahead.

Smith testifies that he saw Stoops at the Southmoor hotel in the month of March or April, 1928, and that Mr. Bill and Mr. Rosenfield were with him. He recalls the circumstances because his wife's birthday was on March 21st. He says that the bellboy came to him and said that defendant wanted him in the lobby; that he went in there and there were three men there - Rosenfield, Bill and Stoops; that defendant told him to show them through the building; that he took them upstairs; that when they came back defendant was standing by the cigar stand and said that he, defendant, would show them through the basement, kitchen and dining room. Thereupon Smith turned the party over to defendant.

Defendant Gittler testifies that he met Rosenfield and Bill in the middle of February; that the hotel was already listed with various brokers; that Bill asked for an exclusive agency, which he refused to give; that the defendant told Bill that he could get statements from the manager and gave him a rough estimate of the earnings in case the hotel was full; that he told Bill that in trade the price was $4,500,000. Defendant says that he never saw Bill after that. He denies that anything was said about commissions.

He says that Rosenfield thereafter submitted one Fishman as a prospective buyer, who wanted to know if defendant would accept a second or third mortgage in trade. Defendant says he never received from any of the plaintiffs the alleged letter of April 3, 1925, and never told plaintiffs he would pay 3 per cent on $4,500,000 for submitting a name. He further testifies that in the Fishman deal Fishman told him that he had arranged for the commissions with Rosenfield; that this deal was pending until September 5, 1925; that the name of Harry J. Stoops was not mentioned until the last part of November and then by Attorney Altheimer, who represented Mandel Bros. in the collection of notes due from the hotel; that thereafter Stoops was introduced to defendant by Mr. Bloom.

Bloom testified he became acquainted with Stoops in November, 1925; that he was introduced by Altheimer at Bloom's office; that they then went to the hotel where he, Bloom, introduced Stoops to the defendant Gittler.

Stoops testifies that Rosenfield with another gentleman called on him at his office in February and asked whether he was interested in the Southmoor hotel; that he told them he was not interested at all; that he had just had it submitted to him from his Eastern people and that he was not at all interested in it; this, he says, was after he had been out to look the hotel over. Stoops also says he did not receive any letter from plaintiffs about the matter and never received any letters from Mr. Bill of DeVoney, Bill & Company. He says he was in the Southmoor hotel after his return from California and while there ran across some people who were trying to buy the hotel; that he just happened to stop there and was not in the hotel again until the latter part of November, 1925, when he went out there on a proposition put up to him by Mr. Altheimer; that at the request of Altheimer he went to Bloom's office to meet Bloom; that Bloom went with him to the

He says that Rosenfield thereafter submitted [illegible] Fleener as a prospective buyer, who wanted to know if defendant would accept a second or third mortgage in trade. Defendant says he never received from any of the plaintiffs the alleged letter of April 7, 1929, and never told plaintiffs he would pay 2 per cent as [illegible], for submitting a name. He further testifies that in the Fleener deal Fleener told him that he had arranged for the commission to Rosenfield; that this deal was pending until September 3, 1929; that the name of Harry J. Stoops was not mentioned until the last part of November and then by Attorney Altheimer, who represented [illegible] Bros. in the collection of notes due from the estate; that [illegible] Stoops was introduced to defendant by Mr. Dixon.

Dixon testified he became acquainted with Stoops in November, 1929; that he was introduced by Altheimer in Altheimer's office; that they then went to the hotel [illegible], introduced Stoops to the defendant [illegible].

Stoops testifies that Rosenfield, [illegible] called on him at his office in February and asked whether he was interested in the Bismarck hotel; that he told him he was not interested at all; that he had just had it submitted to him from his Eastern people and that he was not interested in it; this, he says, was after he had been out to look the hotel over. Stoops also says he did not receive any letter from plaintiffs about the matter and never received any letter from Mr. [illegible] of DeVoney, [illegible] & Company. He says he was in the Bismarck hotel after his return from California and while there was approached by people who were trying to buy the hotel; that he just happened to stop there and was not in the hotel again until the latter part of November, 1929, when he went over there to a transaction set up to him by Mr. Altheimer; that at the request of [illegible] he went to Fleener's office to meet Dixon; that Dixon went with him to the

Southmoor and introduced him to the defendant Gittler; that he then made an appointment to meet defendant and Bloom at the office of Altheimer & Mayer the next day, where the negotiations for the purchase of the hotel were closed. On cross-examination Bloom specifically denied that in the spring of 1925 he had knowledge that Stoops was a prospective purchaser or that he had any knowledge that plaintiffs were trying to make a sale for defendant. He heard of the Fishman contract but was not present when it was prepared and did not see it. He did not know a prospective purchaser named Gunderson nor hear of a Gunderson contract.

Fishman testifies that he signed a contract for the purchase of the hotel on August 6, 1925, at the office of Kaplan & Kaplan in the presence of Mr. Kaplan, defendant Gittler, Mr. Smith and Mr. Peters; that Rosenfield was outside the room and not present inside when the deal was closed; that Rosenfield at that time told him that the deal was about to be closed, and that their agreement would stand good, which was that Rosenfield would get $15,000 if the deal was consummated, and that Rosenfield said he was perfectly satisfied. He says that Rosenfield said nothing to him about arrangements with defendant nor anything about having any arrangements with defendant about commissions in connection with that deal.

On December 2, 1925, Bloom, defendant, Kaplan and Mayer being present, Stoops made a proposition to defendant in writing which recited certain obligations of the corporation and proposed that he would purchase the stock and defendant's interest in the mortgage, notes, bonds, and other claims of the defendant for the sum of $630,000, payable $25,000 in cash upon acceptance, $175,000 in cash on or before January 10, 1925, and $130,000 in 18 monthly instalments to be secured by certain collateral, the second mortgage of $500,000 to be cancelled and satisfied and in

Gentleman had intimated this to the Corporation Attorney, and he had made an examination to make certain that claims to existence of Gilmore & Lazar the most day, which was equivalent to the purchase of the hotel were closed. On examination there specifically denied that in the spring of 1920 he had borrowed that there was a preceding mortgage on the hotel, but they knew, edge that principals were liable in case a mortgage existed. He heard of the Gilmore contract for the only present when it was produced and did not see it. He did not read a conveniently and answer owned Gentlemen had been of a mortgage existence.

Gilmore testified that he had to employ a contract for the purchase of the hotel on August 6, 1920. In the office of Gilmore & Lazar in the presence of Mr. Lazar, President Gilmore, Mr. Gelber and Mr. Peters; that Gelberick was present the time and not present inside when the deal was closed; that Gelberick at that time told him that the deal was about to be closed, and that their agreement would stand good, that was that Gilmore would get $18,000 if the deal was consummated, and that Gelberick would be was partially satisfied. He made that Gelberick said it to him about arrangements with Gelberick and stating about being any arrangements with Gelberick about commissions in connection with that deal.

On Tuesday 8, 1920, Gilmore, Gilmore, Lazar and Mayer being present, Gilmore made a proposition to Gelberick in which they which rented certain obligations of the Gelberick and proposed that he would guarantee the stock and determine its interest in the mortgage, either, under, and from either of the Gelberick in the sum of $800,000, supplie $75,000 in case cash consideration, $175,000 in case on or before January 1, 1920, and $125,000 in monthly instalments to be secured by certain collateral. The amount mortgage of $500,000 to be assumed and mortgage was in

lieu thereof bonds aggregating $300,000 to be issued to be secured by a junior mortgage on the same property. These latter bonds were to be delivered to defendant less such amounts as might be retained as agreed for specific purposes. This agreement was carried out by the parties.

In weighing this conflicting evidence it must be remembered that the burden of proof was upon the plaintiffs. On some of the material points the number of witnesses testifying to a given state of facts is in favor of the plaintiffs; on the other hand, some of plaintiffs' evidence seems quite improbable. Assuming a fair degree of intelligence on the part of defendant, it can hardly be supposed he would agree to pay three per cent on $4,500,000 irrespective of the amount for which the property might be sold. There is some doubt cast upon the letters by the fact that such practice was not followed in other proposed deals, to which the same agreement, according to plaintiffs' testimony, would have been applicable. A registered letter would have furnished undisputed proof, but this method was not adopted. Then, the admitted fact that plaintiff Bill brought a suit on this claim in behalf of his own firm without joining Rosenfield as a co-plaintiff is not consistent with his statement now that the employment was joint. There are also improbabilities in some of the testimony for the defendant. It would be a burdensome task indeed to discuss all of the evidence for and against, as has been done in the voluminous briefs filed in behalf of these parties. We have gone over it carefully. One group of witnesses or the other is wilfully testifying contrary to the truth of the matter. It is not possible to concede good motives to both sides.

The findings of fact in such cases are peculiarly within the province of the jury. Rarely indeed is a verdict disturbed by an appellate tribunal where the facts are as uncertain

lieu thereof [illegible] by foreclosing [illegible] as it would be secured by a junior mortgage on the same property. These little bonds were to be delivered to defendant Lyon such amounts as might be retained as agreed its specific purposes. This agreement was carried out by the parties.

In rejecting this conflicting evidence it must be remembered that the burden of proof was upon the plaintiffs. On some of the material points, the number of witnesses testifying to a given state of facts is no index of the probability; on the other hand, some of plaintiffs' witnesses seem quite improbable. Assuming a fair degree of intelligence on the part of defendants, it can hardly be supposed he would agree to pay [illegible] per cent on $1,500,000 irrespective of the amount for which the property might be sold. There is some doubt cast upon the evidence by the fact that such practice was not followed as other disputed sales, to which the same agreement, according to plaintiffs' evidence, would have been applicable. A memorandum in writing might have furnished undisputed proof, but this method was not adopted. Again, the admitted fact that plaintiffs [illegible] in behalf of its own firm without joining defendant as a co-plaintiff is not consistent with the claim that [illegible] and joint. There are also inconsistencies in some of the testimony for the defendant. It would be a needless task indeed to discuss all of the evidence pro and against, as has been done in the voluminous briefs filed in behalf of these parties. We have gone over it carefully. One group of witnesses or the other is wilfully testifying contrary to the truth of the matter. It is not possible to conceive good motives to both sides.

The findings of fact in such cases are peculiarly within the province of the jury. Rarely indeed is a verdict disturbed by an appellate tribunal where the facts are in question.

and conflicting as here. The trial judge and jury had obvious advantages in weighing the evidence. Even if we should be of the opinion that sitting as jurors we would have returned a different verdict, this would not justify us in setting aside this verdict. It is the verdict of twelve men from all walks of life who saw and heard the witnesses. It has been approved by a judge who also saw and heard the witnesses. We may set it aside only if we are able to say that after considering all the facts we are convinced that the verdict is against the manifest weight of the evidence. We cannot say this. The contention of plaintiffs that the verdict is against the manifest weight of the evidence cannot be sustained.

Plaintiffs say that the court erred in making improper and prejudicial remarks in the presence of the jury and that counsel for the defense also made improper remarks, but we find no assignment of error covering this point. However, we think the statement of the Supreme Court in Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, is applicable to the record. The court there said in substance that every unguarded expression of a judge should not be treated as grounds for granting a new trial.

It is urged that the court erred in admitting evidence concerning the proposed sale of the hotel to one Fishman. It is said that the only reference to this sale in the first instance was brought out in a cross-examination by defendant which transgressed the rule that the cross-examination should be limited to the facts brought out in the examination (Schmidt v. Chicago City Ry. Co., 239 Ill. 494), and that defendant could not offer evidence tending to impeach a witness of the plaintiff on immaterial matters thus brought out. (L.S.& W.A.R.Co. v. Morain, 140 Ill. 117).

Plaintiffs, we think, misunderstand the record on this point. Plaintiffs offered as a part of their case evidence tending

to show a contract which allowed the production of any proposed purchaser which plaintiffs might find, not a particular named purchaser. They offered evidence tending to show that they had submitted the property to Mr. Lauder, Mr. Fishman, Mr. Stoops and others. Evidence as to the existence of other contracts with these named, or, indeed, we think, with any prospective purchaser up to the time of the sale of the property was admissible in view of the broad nature of this alleged contract. The fact that the matter was first brought out on cross-examination would not prevent its introduction as a part of the defense if material and relevant. Of course, it is necessary that such evidence should be limited to material matters. It was so limited by the rulings of the court.

It is also urged that the court erred in admitting evidence of conversations of Altheimer, Bloom and Stoops out of the presence of plaintiffs. This evidence was, however, stricken out on motion of plaintiffs' attorneys, and we think at any rate it could have done no injury. Complaint is also made that Stoops was permitted to say that when at the hotel in March, 1925, with Mr. Hawes, in response to a statement by a Mr. Fryer that he was too late, he (Stoops) said he was not out to buy the hotel. We think this was not inadmissible in view of the evidence given by plaintiffs to the effect that they had taken Stoops to the hotel at that time that he might examine it as a prospective purchaser.

It is also complained that the contract between Stoops and defendant was admitted in evidence and that evidence as to the payment of a commission of $30,000 to Altheimer was admitted. Day v. Porter, 161 Ill. 235, and Ogren v. Sundell, 220 Ill. App. 584, are cited. Here again the broad nature of the contract alleged by plaintiffs distinguishes this case from those cited. Indeed, proof of this transaction was essential to plaintiffs' case.

We hold there was no reversible error in the admission

to show a contract which allowed the commission of any responsible purchaser which plaintiffs might find, not a particular named purchaser. They offered evidence tending to show that they had submitted the property to Mr. Lasker, O. Plummer, Mr. Jacobs and others. Evidence as to the existence of other contracts with those named, or, indeed, we think, with any prospective purchaser at the time of the sale of the property was admissible in view of the broad nature of this alleged contract. The fact that the matter was first brought out on cross-examination would not prevent its introduction as a part of the defense if material and relevant. Of course, it is necessary that such evidence should be limited to material matters. It was so limited by the rulings of the court.

It is also urged that the court erred in admitting evidence of conversations of Alderbury, Adams and Stocks out of the presence of plaintiffs. This evidence was, however, stricken out on motion of plaintiffs' attorneys, and we think at any rate it could have done no injury. Complaint is also made that Stocks was permitted to say that when at the hotel in Lanes, 1919, with Mr. Hawes, in response to a statement by a Mr. Tyner that it was too late, he (Stocks) said he was not out to buy the hotel. We think this was not inadmissible in view of the evidence given by plaintiffs to the effect that they had taken Stocks to the hotel at that time that he might examine it as a prospective purchaser.

It is also complained that the contract between Stocks and defendant was admitted in evidence and that evidence as to the payment of a commission of $5,000 to Alderbury was admitted. Fox v. Porter, 151 Ill. 235, and Bowman v. Hopkins, 210 Ill. App. 354, are cited. Here again the broad nature of the contract alleged by plaintiffs distinguishes this case from those cited. Indeed, proof of this transaction was essential to plaintiffs' case.

We do not think there was any reversible error in the admission

of evidence.

The plaintiffs also contend that there were errors in giving and refusing instructions. Complaint in particular is made of instruction No. 7 given at the request of defendant, by which the jury was told that one of the material issues in the case was whether or not the plaintiffs were the procuring cause of the sale; that the burden of proof was upon them to show that they were the procuring cause, and that if the jury should find from the evidence that they had not so proved they could not recover. Complaint is further made of instruction No. 8, which told the jury that plaintiff's claim was as brokers for compensation by way of commissions upon a sale of property made by the defendant to Stoops; that to entitle the plaintiffs to recover any compensation on account of the sale, the jury must believe from a preponderance of the evidence that plaintiffs were employed by the defendant in and about the business of making the sale and that their services were instrumental in accomplishing it.

Plaintiffs also complain of instructions Nos. 9 and 10 given at defendant's request, by which the jury was told that if it believed that the defendant Gittler made the sale of his shares of stock in the Keltig Building corporation without the assistance of the plaintiffs and that plaintiffs in fact did not furnish a purchaser for the defendant's shares of stock, the verdict should be for the defendant, and that if they believed that some person or persons other than the plaintiffs were the procuring and efficient cause of the sale between the defendant and Stoops, then the plaintiffs were not entitled to recover anything.

The plaintiffs point out that these instructions are mandatory and direct a verdict and that it was error for the court to tell the jury that one of the material issues was whether plaintiffs were the procuring cause of the sale; that the theory of

of variance.

The plaintiffs also contend that there was error in giving and refusing instructions. Complaint is made of instruction no. 7 given at the request of defendants, in which the jury was told that one of the material issues in the case was whether or not the plaintiffs were exercising care of the mule; that the burden of proof was upon them to show that they were the proximate cause, and that if the jury should find from the evidence that they had not so proved, their verdict was over. Complaint is further made of instruction no. 9, which told the jury that plaintiff's claim was an insurance for consequential by way of compensation upon a policy of insurance made by the defendant in Stone; that to entitle the plaintiffs to recover any compensation on account of the mule, the jury must find from a preponderance of the evidence that plaintiffs were negligent in the defendant in and about the business of insuring the mule and that their negligence was proximate in consequence.

Plaintiffs also complain of instructions nos. 3 and 10 given at defendant's request, by which the jury was told that if it believed that the insurance district with the exclusive charge of their in the Stone insurance association was negligence of the plaintiff's and that negligence in fact the proximate cause of the defendant's failure to pay a claim, the verdict should be for the defendant, and that if they believed that some person or persons other than the plaintiffs were the proximate and efficient cause of the mule having been poisoned and killed, then the plaintiffs were not entitled to recover anything.

The plaintiffs also contend that these instructions are contradictory and present a variant and lower rule for the court to tell the jury that one of the principal claims was neither claim title were the proximate cause of the mule, that the theory of

plaintiffs was that they were to furnish a man who would buy but that defendant was to induce him to buy; that an agreement to pay a stipulated commission for submitting the name of a buyer as distinguished from making a sale or being the procuring cause of the sale does not amount to an undertaking to sell the property. In general as to all these instructions, they contend they were erroneous because they ignore the plaintiffs' contention and theory that they were employed only to introduce a buyer and not to make a sale. An examination of plaintiffs' declaration discloses that these contentions cannot prevail. It would have been improper to give an instruction which presented a case substantially different from that stated in the declaration. Schmidt v. Balling, 91 Ill. App. 388. The various counts of plaintiffs' declaration asserted that they "secured a purchaser;" that "plaintiffs were the direct procuring cause of securing said purchaser;" that the plaintiffs secured a purchaser "ready, willing," etc.; that "said plaintiffs did procure and produce for said defendant a purchaser;" that "as a result of plaintiffs' efforts, they procured and produced to the defendants a purchaser;" that plaintiffs "procured one Harry J. Stoops," etc.; that "plaintiffs procured a purchaser for the said capital stock, who purchased the same."

It is apparent therefore that plaintiffs presented their case upon the theory that they had procured the purchaser to whom defendant sold. It certainly cannot be held error for the court to give instructions which correctly set forth plaintiffs' theory as stated in their declaration. Indeed, it would have been erroneous to refuse such instructions. There is, we think, in substance no difference between an averment that plaintiffs procured the purchaser and an averment that they were the cause of the sale.

Complaint is made of defendant's given instructions Nos. 11 and 12. By instruction 11 the court told the jury that one

plaintiffs see that they were in learning a way they could by the that defendant was to induce him to buy; that he consented to buy a stipulated commission for minimizing the sum of a lower as disqualified from making a sale or being the proximate cause of the sale does not amount to an understanding to sell the property. In general as to all these instructions, they contend they were erroneous because they ignore the plaintiff's contention and theory that they were employed only to introduce a buyer and not to make a sale. An examination of plaintiff's declaration discloses that these contentions cannot prevail. It would have been improper to give an instruction which presented a case substantially different from that stated in the declaration. Bennett v. Bailey, 97 Ill. App. 384. The various counts of plaintiff's declaration allege that they "secured a purchaser;" that "plaintiffs were the direct procuring cause of securing said purchaser;" that the plaintiffs secured a purchaser "ready, willing," etc.; that "said plaintiffs did secure and produce for said defendant a purchaser;" that "as a result of plaintiffs' efforts, they secured and produced to the defendant a purchaser;" that plaintiffs "procured and found a party to trade," and; that "plaintiffs procured a purchaser for the said defendant, who purchased the farm."

It is somewhat doubtful if the plaintiffs presented their case upon the theory that they had procured the purchaser to whom defendant sold. It certainly could not be said that the court to give instructions which particularly or fully presented theory as stated in their declaration. Instead, it would seem that they preferred to rely on such instructions. There is, we think, no substance to the difference between an argument that plaintiffs procured the purchaser and an argument that they were the cause of the sale.

Complaint is made of defendant's given instructions Nos. 11 and 12. By instruction 11 the court told the jury that the

of the contentions of the plaintiffs was that defendant promised to pay a commission of three per cent on four and one-half million dollars irrespective of the amount the Heltig building corporation property might sell for, provided the plaintiffs furnished the defendant with the name of any person who was interested and purchased the property in question; that the burden of proof was upon the plaintiffs under this contention to prove by a preponderance of the evidence not only that defendant made such a promise but also that plaintiffs furnished the name of a person interested in the purchase of the property; that the fact that the plaintiffs may have furnished the name of Stoops in April, 1925, did not entitle the plaintiffs to recover, provided the jury believed that at the time the name of Stoops was furnished Stoops was not interested in the purchase of the property, and that the fact that Stoops purchased the shares of stock in December, 1925, did not entitle the plaintiffs to recover, provided the jury believed from a preponderance of the evidence that the purchase was brought about by persons other than the plaintiffs and without fraud on the part of the defendant. Instruction No. 12 told the jury that if it believed that plaintiffs were authorized by defendant to offer the real estate and personal property known as the Southmoor Hotel owned and operated by the Heltig building corporation for sale upon certain terms and conditions, and that defendant did not agree with plaintiffs that he would protect them against all other brokers and persons with respect to any prospective purchaser submitted to him by the plaintiffs, and that if they further believed that plaintiffs submitted the name of Stoops and that Stoops refused to consider the purchase of the property and thereafter the thought of purchasing the property upon the terms submitted by the plaintiffs passed out of the mind of Stoops and that thereafter defendant, solely through the efforts of persons other than the plaintiffs and wholly without participation of the

plaintiffs, or either of them, sold his shares of stock to Stoops, then plaintiffs would not be entitled to recover.

There is, of course, no question since these instructions are mandatory that each should be complete in itself and that each should embrace all the facts essential to the verdict directed. Ill. Iron & Metal Co. v. Weber, 196 Ill. 526; C. & A. R. R. v. Kuckkuck, 197 Ill. 304; Cantwell v. Harding, 249 Ill. 354.

Plaintiffs complain that instruction No. 11 advised the jury that, notwithstanding plaintiffs furnished Stoops as a prospective buyer and defendant promised to protect plaintiffs as to buyers submitted by them against all others and to pay all commissions if the buyer bought, yet if he was not interested when plaintiffs submitted him and afterwards became interested, plaintiffs could not recover. We do not think this instruction contrary to the law or that it could have misled the jury. The declaration averred that plaintiffs produced the buyer. They did not produce him if he was not interested when the matter was submitted to him, and if it was necessary to find persons other than plaintiffs who could get him interested, plaintiffs would not be entitled to recover.

Complaint is also made because the court refused to give plaintiffs' instruction No. 14 as requested. This instruction told the jury that if it found that defendant listed the property with the firm of DeVoney, Bill & Company and Rosenfield for sale on such price, terms and conditions as defendant would make to a buyer and promised to pay them for their services or commissions in procuring a purchaser, three per cent on the gross or aggregate price of the sale, and further found that through the efforts of plaintiffs defendant procured the witness Stoops as a buyer for the hotel, then plaintiffs were entitled to recover from defendant three per cent on the gross or aggregate price at which the jury should

plaintiffs, or either of them, will give notice of intent to [illegible], then plaintiffs would not be entitled to recover.

There is, of course, no question which these instructions are mandatory that each employee is entitled to assume that each employee will the facts contained in the warning directed. Ill. Iron & Metal Co. v. Dolan, 187 Ill. 548; Ill. Cent. R. R. v. Hawkins, 197 Ill. 444; Chicago & W. Ind. Co. v. Dunn, 146 Ill. 304.

Plaintiffs contends that instructions 2, 3, 4 refused the jury that, notwithstanding plaintiffs instructed thereon is a proximative bar and defendant promises to assume risks to be injured by them complained of, stress and it was not in the ordinary relations of the master servant, yet if he was not like manner plaintiffs employed his and afterwards became interested, plaintiffs could not recover. To do not claim such instructions contrary to the law or that it could have misled the jury. The instructions warned that plaintiffs assumed the risks. [illegible] him if he was not interested when his master was [illegible], and if it was necessary to find evidence other than plaintiffs could get his interest. Plaintiffs could not be entitled to recover.

Objection is also made because the court refused to give plaintiffs' instruction 10. It is as follows: "The defendants told the jury that if it found that defendant liked the company with the fire of defendant, that I company was [illegible] on each price, there was evidence to defendant would make to a [illegible] and promised to pay them for their services or [illegible] in [illegible] a partner, [illegible] of the city of [illegible] of the wife, and [illegible] defendant [illegible] plaintiffs [illegible] note, that plaintiffs were [illegible] per cent on the [illegible] of [illegible] [illegible]

find from the preponderance of the evidence defendant sold the hotel.

It is urged that this instruction should have been given upon the theory that there was some proof from which the jury might infer an agreement to pay three per cent on the amount of the sale instead of three per cent on the four and a half million dollars, and that plaintiffs were entitled to have the court instruct on that theory. We think, however, this instruction was substantially covered by others, and while it might have well been given it was not reversible error to refuse it.

We have considered these instructions quite at length, assuming plaintiffs did not request the instructions of which they complain. Our assumption is not justified by the record, which merely states "Instructions each side reserving an objection to each instruction."

The record is voluminous and it may not be entirely free from error, but we think the error, if any, is not reversible, and the judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

find from the requirements of the problem [illegible] hotel.

It is argued that this interpretation [illegible] given upon the theory that there was some [illegible] jury might infer an agreement to pay [illegible] of the sale instead of three per cent [illegible] dollars, one that plaintiffs [illegible] against on that theory. The trial court [illegible] substantially entered by [illegible] given if was not requested after [illegible].

We have considered these [illegible] assuming plaintiff did not [illegible] conclusion. Our examination is not [illegible] merely states "instructions [illegible] such instruction."

The record is [illegible] free from error, let we [illegible] and the judgment is [illegible].

REFERENCES.

O'Donnell, P. J., and Kennedy, J., concur.

33002

In Re Estate of EDWIN B. JENNINGS, Deceased,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
In Re Appeal of EDWARD C. KOESTER, Petitioner.	There heard on Appeal from Probate Court of Cook County.

252 I.A. 660[3]

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Edwin B. Jennings, a resident of Cook County, Illinois, died October 31, 1923. Administrators of his estate were appointed and according to the usual practice a table of heirship was entered. Bogart v. Brazee, 331 Ill. 160. On October 31, 1927, Edward C. Koester filed a petition in which he avers that he is the son and only heir at law of said Edwin B. Jennings; that said Jennings about April 5, 1885, at Sycamore, Illinois, was married to Johanna Duewel; that petitioner was the only child born of said marriage and that no child was adopted, and that the mother died shortly after the birth of petitioner.

The petition prayed for a hearing and that the table of heirship might be vacated and a new one entered showing his relationship. On January 17, 1928, the Probate court entered an order denying the prayer. An appeal was taken to the Circuit court, and on June 28, 1928, that court after hearing evidence found that petitioner was not in any way related to Edwin B. Jennings and was not an heir at law of said deceased and dismissed the petition. From that order this appeal has been perfected.

Respondent Cassie Bogart, one of the heirs at law, has entered a motion to dismiss this appeal on the ground that a decree entered by the Circuit court of DuPage county, Illinois, in a proceeding to partition certain lands to which petitioner was made a party has become final and that such decree renders the further consideration of this appeal useless. A transcript of

the record of the court of DuPage county in that cause is attached to the motion, and suggestions and counter-suggestions have been filed.

The suggestions are not without merit. However, having examined the record, we prefer to rest our decision upon the merits. The motion is therefore denied.

The petitioner contends that the trial court erred in admitting incompetent evidence, but as the matter was heard without a jury such error, even if conceded, would not compel a reversal. It is urged that competent evidence offered was excluded (much of it, we hold, properly), but petitioner's offers to prove are in the record, and if all this evidence had been received it would not change our conclusion.

Petitioner also contends that the finding and judgment are contrary to the weight of the evidence, and this is the controlling question in the case.

The table of heirship, which petitioner asks to have set aside, is prima facie correct, and the burden of proof was upon him. In determining that question it may be well in the beginning to state a few uncontradicted facts.

Edwin B. Jennings was at the time of his death 64 years of age; he lived in Chicago, Illinois, during his entire life. He was the son of John D. Jennings, who died in Chicago on April 19, 1889. Edwin B. Jennings was known as a man shrewd in business affairs. He dealt largely in real estate; in conveyances he uniformly described himself as a bachelor. On April 29, 1899, the Circuit court of Cook county entered a decree in a proceeding relating to a trust established by the last will and testament of his father, John D. Jennings. Edwin B. was a party to the proceeding and filed an answer admitting, as the decree found, that he had never married or had issue. Edwin B. left an estate estimated to

be of the value of $5,000,000.

Johanna Duewel was the daughter of Joachim, also known as Joseph, Duewel, and his wife Maria Duewel. Maria's maiden name was Maria Engenfer, and she had a sister, Sophia, who married August Koester. August and his wife Sophia, prior to 1885 and afterwards, lived in Wayne County, Michigan. They, as were the Duewels, were farmers. The Duewels, Koesters and Engenfers were immigrants from Germany and were associated with the evangelical Lutheran church.

August Koester, the husband of Sophia, died on August 18, 1896, an inhabitant of Brownstone township, Wayne county, Mich. The records of the Probate court indicate that he left real estate of the value of about $8,000. The proof of heirship there shows that he left him surviving his widow and eight children, one of whom was petitioner, Edward Koester. As late as January 15, 1924, upon a hearing of the final account, Sophia Koester then being dead, the Probate court of Wayne county ordered the estate to be assigned in equal shares to said Edward Koester and the other heirs.

Sophia Koester died on January 30, 1923. On February 26th of the same year, on petition of her daughter, Minnie Hankey, administration of the estate was granted to her said daughter by the Probate court of Wayne county, Michigan. The petition named as heirs with the others the son Edward, petitioner herein.

Augusta Johanna Duewel was born in Wodenick, Pomerania, April 7, 1870, daughter of Joachim and Maria Duewel. Her body is buried in the Duewel family lot at Dundee, Kane county, Illinois, and the inscription on the family monument states that she was born April 7, 1870, and died September 22, 1883. Prior to 1881, Joachim Duewel and his family lived on a farm near Sycamore, DuPage county, Illinois; they afterward moved to Kane county near Dundee, and the records in the recorder's office indicate that on February

28, 1884, Joachim Duewel purchased a tract of land in that county from Christian Lorenz. The church records at Dundee show that Joachim Duewel and his family joined the church at Dundee on January 2, 1861, and that his daughter Fredericka was married to Christian Lorenz on August 21, 1861.

The death register of the church at Dundee shows the death of Augusta Johanna Duewel on September 22, 1883, and states her age at that time to have been 13 years, 5 months and 15 days and that she was buried on September 24, 1883. The church membership record also shows her death on the same date. It is argued that these church records were erroneously admitted in evidence, but the objections were only general and not specific. Gage v. Eddy, 186 Ill. 432; Lunger v. Sechrest, 186 Ill. App. 521. The records were identified by their custodian (Dailey v. Brotherhood of R. R. Trainmen, 311 Ill. 189) and, moreover, petitioner introduced similar records. We therefore hold the same to be properly in evidence. Bogart v. Brazee, 331 Ill. 160.

Joachim Duewel died a resident of East Dundee, Kane county, Illinois, on August 16, 1912, testate. He left him surviving, according to the proof of heirship made in the County court, his widow, Maria, his sons and daughters and two grandchildren. The petition for letters on his estate was signed by his surviving wife, Maria, and the petitioner is not named in said petition as one of the heirs.

The records of the church at Wyandotte, Michigan, show the baptism at the home of his parents on October 20, 1885, of Edward Karl Franz Koester, son of August and Sophia Koester, and the date of his birth is there stated as August 18, 1885.

On December 28, 1906, petitioner, under the name of Edward Chesley Koester, enlisted in the U. S. Navy. A certified copy of the service record gives his former residence as Trenton, Michigan, and states that his next of kin was his mother, Sophia

20, 1862, Joachim Dureal purchased a tract of land in that county from Christian Lermen. The church records at Galena show that Joachim Dureal and his family joined the church by baptism on January 8, 1863, and that his daughter Frederike was married to Christian Lermen on August 23, 1863.

The death register of the church at Galena shows the death of Auguste Johanne Dureal on September 22, 1864, and states her age at that time to have been 13 years, 3 months and 15 days and that she was buried on September 24, 1864. The Galena church only record also shows her death on the same date. It is argued that these church records were improperly admitted in evidence, but the objections were only general and not specific. Smith v. Smith, 198 Ill. 446; Fosdick v. Heinrich, 106 Ill. App. 330. The records were identified by their custodian (Wilson v. Governors of the ... Graham, 261 Ill. 105) and, moreover, petitioners introduced similar records. We therefore hold the same to be properly in evidence. People v. Lewis, 330 Ill. 406.

Joachim Dureal died a resident of Rush Hanover, Jo Daviess county, Illinois, on August 18, 1865, intestate. He left him surviving, according to the proof of heirship made in the Probate court, his widow, Maria, his sons and daughters and two grandchildren. The petition for letters on his estate was signed by his surviving wife, Maria, but the petitioner is not named in said petition as one of the heirs.

The records of the church at Lynchburg, Michigan, show the baptism of the sons of his parents on October 8, 1848, of Edward Carl Ernest Hoskins, son of Samuel and Sophia Hoskins, and the date of his birth in Clinton, Michigan as August 13, 1848.

On December 21, 1862, petitioner, under the name of Edward Charley Hoskins, enlisted in the U.S. Navy. A certified copy of the service record gives his former residence as Clinton, Michigan, and states that the name of his next kin was his mother, Sophia

Koester, of Trenton, Michigan; that he was born August 18, 1884, at Monguagon, Michigan. Petitioner also served in the U. S. Army and a certified copy of the service record shows that he enlisted October 26, 1918; that he reported in person and gave the name and address of the person to be notified in case of emergency as Mrs. Sophia Koester, mother, Trenton, Michigan. His declaration in the service records states that he was born in Monguagon, Michigan, on August 18, 1885; that he is by occupation a diner inspector of the N. Y. C. railroad, a citizen of the United States, married, and has no children and that no one is dependent on him for support.

This is the third attempt of petitioner to secure for himself the estate of Edwin B. Jennings. Koester v. Jennings, 334 Ill. 107. In October, 1926, he filed a petition praying that an alleged will of Edwin B. Jennings in which he was named as sole legatee might be admitted to probate. In that petition he averred that the heirship had been found and entered on December 26, 1923, and amended on July 27, 1925, setting up the names of the heirs so found but averring that other persons claimed to be heirs whom he made defendants as "unknown heirs." His petition also stated, "Your petitioner is without knowledge of the names and relationships, places of residence and post office addresses of the heirs-at-law of the said Edwin B. Jennings, deceased."

In the course of his career petitioner has been confined in the penal institutions of Michigan and California. In April and May, 1926, while thus detained at Marquette, Mich., petitioner wrote a series of letters to a cousin, Mrs. Mamie Maas, at Chicago, Illinois. In these letters he repeatedly refers to Sophia Koester as his mother, and in one of them says, "As you know, mother died on January 31, 1923." In this letter he also said:

> "I got a wire to come home at once as Frances, my wife, was sick. *** She passed quietly away. *** She was buried in West Mound where my parents are buried. *** Well Mamie, I am not feeling good today so I'll not write much more only about

the estate, you will recall when I was in Chicago in Oct. 1918, well it was at that time Mr. Edwin B. Jennings made his will, naming me sole heir to his estate of over $6,000,000.00, the will was witnessed by three people, who are all living and who recall every detail of the making and signing, the will soon Comes up for probate. I think everything is fine so far. Mrs. W. V. Warner drew up the Will in the Victoria Hotel where she was the stenographer, her maiden name was Mary Stahl. If you wish I tell her to call on you, she can tell you all about, she is a fine lady. I am looking for a letter from her tomorrow. Well Mamie, if I am successful, and I don't see any reason why I am not going to be, you sure shall see beautiful California, for, really, Mamie, you really were closer to me when we were kids than my own sister.*****

Your cousin,
Edward C. Koester."

The county clerk of DeKalb county testified that he had made an examination of his files and records and found no children born of Edwin B. Jennings. He produced a certificate, however, sworn to by Mrs. Warner, a witness whose testimony is hereafter recited, which he said he had received through the mails August 2, 1927. He examined the records of his office with reference to birth certificates of children born to Edwin Breezee Jennings or Johanna Fredericka Duewel and found no such record. He examined the records of his office as to a marriage between Edwin B. Jennings or Edwin Breezee Jennings and Johanna Fredericka Duewel or Augusta Duewel. He said that the marriage record goes back to the year 1885 and that he had examined it subsequent to that time. He says that the birth records of 1885 were not kept in the shape they are now; that there were a lot of births around 1885 that were never recorded, but all marriages were recorded.

The evidence submitted in behalf of petitioner was substantially as follows:

Agnes Myers testifies that she was present at the marriage of Augusta Duewel to Edwin B. Jennings. She says that in 1885 she was 12 or 13 years of age; that she went to visit relatives named Allen who resided somewhere near Sycamore, DuPage county, Illinois; that she remained at their home about two weeks; that she drove out to Sycamore with a horse and wagon from

Chicago in the evening; that she does not remember whether they drove through Sycamore; that she does not know where John Allen, her cousin, is now but she last heard he was in SanFrancisco. She has not seen John Allen or his wife since this visit to the farm. The Allens had no children; John Allen had no brothers or sisters that she remembers. She does not know whether the place to which she went was north, south, east or west of Sycamore. The Allen farm joined the Duewel farm, but she does not know in which direction. The Allens lived perhaps a mile or a mile and a half from the Duewels. She says she met Johanna Duewel and her mother on the day of the wedding; that there were probably six or seven persons at the wedding, - the preacher, Jennings, Mrs. Duewel, Johanna and some children whose names she cannot recall, her aunt, Anna Myers, Mrs. Allen and herself.

She never heard of Mr. Jennings again until 1913 - 33 years thereafter. She then met him in the doorway at 29 south La-Salle street, Chicago, in January, 1913. She met him when she had an appointment with a Mr. Sawser, who has since died, and a salesman name Corey, who did not testify. She says that she said to him, "The first wedding I ever attended, or marriage I ever attended, the man's name was Edwin E. Jennings," and that he said, "I guess I am that man." She says she asked him how his wife was and he replied, "My wife died when our son was born." Then he changed the conversation and seemed reluctant to talk about it.

The court asked this witness, "Did you see the ceremony performed?" and she replied, "Yes. I heard the minister perform the ceremony and I remember they joined hands and he blessed them. That is the first wedding I ever attended. The ceremony was performed in the English language. At that time I was 12 years old."

Petitioner also produced as a witness Mrs. Emma Steffen, who said she was the wife of Rev. J. T. Steffen, pastor of a church

Chicago in the evening; [illegible]

[illegible]

The Allen farm [illegible] which direction. [illegible]

[illegible]

[illegible] "My wife [illegible]" [illegible]

[illegible]

in 1885. She said they lived at Genoa, DeKalb county, Illinois, of which Sycamore was the county seat, and that her husband preached in the DeKalb county court house. She said she knew the Duewel family and that they were members of her husband's church; that about April, 1885, her husband performed a marriage in the Duewel family but she was not present; that she remembered an occurrence around August, 1885, of the birth of a child in the Duewel family, but she did not remember the record of a marriage between Edwin Jennings and Johanna Augusta Duewel. Upon objection to her testimony, petitioner offered to prove that in August, 1885, her husband told her of the death of Johanna Augusta Duewel in childbirth and that he administered the last sacraments; that he told her that the girl he had married in 1885 had given birth to a child and died in childbirth and that this child was the child of Edwin B. Jennings and his wife, Johanna Augusta Duewel.

This evidence was properly rejected by the court and excluded because it was hearsay.

Mrs. Annie Mann testified that her mother died November 4, 1901; that prior to her death her mother told her that she felt she would soon pass away and that she, the witness, should know a secret; that Edward Koester was the foster-son of Mr. and Mrs. Sophia Koester and that his parents were Edwin Jennings and Johanna Duewel; that at the time of Johanna Duewel's death Mrs. Koester took and raised him as her own child; that at the same time she had given birth to a child who died and she took Edward and raised him as her own son. This witness also testified that she saw Edwin B. Jennings about three times out on the Koester farm and that her mother told her that Jennings came to see Edward Koester. She identified a picture of Jennings as the man she had seen at the Koester farm. She said she was told that Jennings was a Mormon preacher; that she knew of the Duewel lot in Dundee but

in 1898. She said they lived at Tampa, [illegible] county, [illegible], of which [illegible] was the county seat, and that her husband preached in the Baptist church there; that she knew the [illegible] Dureal family and that they were members of her husband's church; that about April, 1905, her husband [illegible] at the Dureal family but she was not present; that she remembered an occurrence around August, 1905, of the birth of a child in the Dureal family, and she did not remember the record of a marriage between Edwin Jennings and Johanna Augusta Dureal. Upon objection to her testimony, [illegible] in [illegible], 1908, her husband told her of the death of Johanna Augusta Dureal in childbirth and that he conducted the funeral services; that he told her that the girl he had married in 1905 had given birth to a child and died in childbirth and that this child was the child of Edwin L. Jennings and his wife, Johanna Augusta Dureal.

This evidence was stricken on motion by the court and excluded because it was hearsay.

Mrs. Lulu Dace testified that she first met Jennings in December 4, 1908; that prior to her death her mother told her that she felt she would soon pass away and that the children [illegible] should have a mother; that [illegible] was the [illegible] of Mr. and Mrs. [illegible] and [illegible] Dureal; that, at the time of Jennings' marriage in [illegible], her mother took and raised him as her own child; that at the time that she had given birth to a child [illegible] raised him as her own son. This witness also testified that she saw Edwin L. Jennings [illegible] and [illegible] that Jennings [illegible]. She [illegible] at the [illegible]. She [illegible] that Jennings was a [illegible]; [illegible] her

had not seen the stone there. She was asked by the court what she meant when she told Mr. Fischer or Mr. Williams that she had never heard of Jennings and if she had any explanation of that answer that she wanted to make. The witness replied, "No, I have not."

Richard J. Trumbull was a cashier at the Arlington Park race track who knew Edwin E. Jennings. He testified that in 1896 he met Jennings who had with him a boy, 9, 10 or 11 years of age; that Jennings said, "This is my boy." He says he saw Jennings with the boy five or six times and that Jennings told him that the boy was living in Michigan; that his mother was dead. This witness stated that his work was to pay out the bets that were won on horses; that he had been around the Metropole and Lexington hotels during the years 1925, 1926 and 1927 many times.

John P. Parker, a salesman in the Boston store for 24 years, testified that Jennings bought many clothes from him, as many as five or six suits at a time; that the witness asked Jennigs what he would do with the clothes and that Jennings said, "Give them away to others; buy them for others;" that at one time in response to a question from him, Jennings answered, "How do you know I am not buying it for my own boy?"

Fred C. Engenfer of Wyandotte, Michigan, a brother of Mrs. Sophia Koester, testified that he remembered the occasion when a dead baby was born to the Koester family; that he made a coffin for the baby and that later when the cemetery had to be removed he moved this body.

Elvie Fowler of Fowlerville, Michigan, testified that in 1910 or 1911 she took Mrs. Sophia Koester to the office of an attorney in Lansing; that Sophia then told her that Ed Koester was her sister's boy and that her sister died when he was born; that she, Sophia Koester, had a child five days older than Ed Koester, or Ed Jennings, and that her baby died; that she raised

and nursed Ed Jennings as her own child. She saw a letter addressed to Sophia Koester at that time and there were two $100 bills in the envelope. An offer was made to show that the letter was signed by Edwin B. Jennings and other alleged facts as to its contents, but an objection was sustained, and properly. Prussing v. Jackson, 208 Ill. 85.

Alfred C. Hoffman,, who operated a hotel in Detroit, testified that he saw Edwin B. Jennings once during his lifetime in the hotel; that he came alone and asked for Ed Koester; that Koester introduced Jennings to him and said, "This is my father."

Minnie Katzkoff, who lived at Wyandotte, Michigan, testified that she had conversations with Sophia Koester "lots of different times" before and after the year 1919; that Sophia Koester first talked with her about the matter twenty years ago in her own house and told her about Jennings and that he often came there. The witness says, "I can't just remember but I know she talked lots, but of course it is so long ago. She says, 'Well, that is the man what's going to leave some day lots of money to that boy.' That is what she told me." She says that Sophia told her how the mother died "so quick and everything;" that she talked with Sophia in September, a year before she died; that Sophia said Edward was not at home, that she didn't know where he was, that she was looking all over for him; that she told the witness to come out the next Sunday, that she was going to tell the whole thing and that when she, Sophia, died, the witness was to tell Edward. The witness, however, didn't go out there the next Sunday. She says that Sophia Koester got letters from Jennings, "lots of them in German. All the letters were in German and she wrote back in German."

Charles Koester, son of Sophia and August Koester, testified that his mother told him that Edward C. Koester was not

and [illegible] Lamont, in his [illegible]. [illegible] a letter [illegible] to Sophie Langer at that [illegible] the [illegible] in the envelope. An order was sent to [illegible] the letter was signed by Edwin S. Jackson [illegible] in the [illegible], but an objection was [illegible]. [illegible], 309 III. 86.

Alfred J. Lamont, the [illegible] a [illegible] to testify that he was [illegible] S. Langer [illegible] in the hotel; that he [illegible] [illegible]; that Hopper [illegible] to the [illegible] this is my letter."

Minnie Lamont, one [illegible] in Quincy, testified that she was [illegible] Sophie Langer [illegible] different times" before the [illegible] her first [illegible] her own house and [illegible] there. The witness says, "I don't [illegible] taking [illegible] that is the [illegible] that say." That is what [illegible] her how [illegible] with Sophie in [illegible] advised [illegible] she [illegible] out the [illegible] and that [illegible] The witness, however, [illegible] more than [illegible] in German. [illegible] German."

Martin Lamont, son [illegible] testified that his mother [illegible] Langer was not

his brother but that she should not tell until after she was dead; that she had taken Ed on the farm to raise when he was but a baby; that his mother died when she was very young; that she, Sophia, had taken him and raised him and very few people knew that he was not her own child and not his brother. He says that she always said that Johanna Duewel was his mother and Mr. Jennings was his father and that they were married; that before this conversation with his mother he had seen Edwin B. Jennings on the farm four or five times; that he saw Jennings and Edward C. Koester there; that his mother received correspondence from Jennings and that he was present when the correspondence was received; he could not give the general contents of the letters; he thinks the letters were all destroyed after his mother's death, that maybe she destroyed them herself; that the letters contained money. He says he knew Jennings as a Mormon preacher; that the last time he saw him was in 1910; that until 1898 the witness thought that Edward was his brother.

Mary Stahl Warner testified that in 1918 she was a public stenographer at the Victoria hotel in Chicago, and that she did work for Jennings; that he told her that Koester was his own son; that he had married in secret; that the mother had died at the son's birth; that the mother of his wife wanted to keep him but that the father would not allow her to raise the boy, so he decided to take the boy to Michigan, and Sophia Koester was to raise him as her own; that Sophia Koester had recently lost her own baby. Mrs. Warner says that Jennings spoke with her quite frequently about this son; that he would always be sending money to him through Mrs. Sophia Koester, Trenton, Michigan; that she saw Jennings and Edward Koester together; that in October, 1918, petitioner came to the Victoria hotel with some other boys and Jennings and that Mr. Jennings said, "This is Eddie, my son." She received a letter from petitioner in March or April, 1926, when he was in the penitentiary

at Marquette. She could not tell how many letters she received from him; she probably destroyed all his letters a few days after she received them. He addressed her at post office box 140, Chicago. After he was paroled from prison he came out to her house and visited. The witness never received a letter from Jennings and had nothing with his handwriting on it. She never made any carbon copies of his letters; after the will was signed she saw him almost every day but never saw him after she left the hotel in 1920, and never heard from him after that. She says, "I wrote letters for him and I wrote the will at his dictation, the will wherein he left everything to his good friend, Edward C. Koester." The witness thought Jennings had a reason for telling her about these matters in that he "wanted me to go with Mr. Koester and I was engaged to my husband who was in France, and I said I would not give him up, and we had quite a hot little --". This witness had also seen the Duewel lot in Dundee -"the first time in July last year." She was there attending a Masonic funeral but did not know whose. Her husband and a Mr. Gibbons were with her. She was in the graveyard once before in 1927, on a wet, cold day, and Mr. Koester was with her. She saw the name Duewel on the tombstone. Koester took a picture of the tombstone that day; it was white and Koester blackened the face of it, but she does not remember that she saw him take a photograph of it after it was blackened. When questioned as to her presence there she replied, "I went up there to look over the hill, I love those scenes for painting." This witness admitted that about August 1, 1928, she subscribed to a birth certificate before a notary public. Koester helped her with the information and she remembered what Jennings told her. She could not recall the exact date but he knew the date of his birth and she did this for him as a friend. This alleged certificate was mailed to the county clerk of DeKalb county and states that the mother of petitioner was Johanna

Augusta Fredericka Duewel, and that she was 17 years of age.

Petitioner also produced as a witness Lee M. Russell, who testified that he was a practicing lawyer of Gulfport, Mississippi, and governor of that state from 1920 to 1924. This witness testified to alleged correspondence with Edwin B. Jennings and Questions were asked by counsel for petitioner as to the contents of these letters. An objection was properly sustained for the reason, as we think, that the preliminary proof failed to show a search in good faith for the correspondence. Prussing v. Jackson, 208 Ill. 85.

Respondents produced Rev. Ernest A. Brauer, pastor of the Immanuel Lutheran church of Dundee, who testified that he met Edward C. Koester in the parsonage at Dundee on December 13, 1927; that a marriage ceremony was performed there at that time; that the bride's name was Dorothy Rankey, and that petitioner Edward C. Koester, stated he was the uncle of the bride, who lived at Wyandotte, Michigan. The man who was married at this time was Roy M. Hoffman. The witness testified that at that time he said to the young couple that they were strangers to him; that he wanted to ask a few questions, and addressing the young man inquired if they were being married with the consent and good will of his parents, to which the young man replied in the affirmative; that he then addressed the young lady and when he asked her she hesitated and then Mr. Koester spoke for her. The petitioner was allowed to contradict this testimony.

Louis F. Grening, 64 years of age, who had lived in Dundee all his life, and whose mother was a sister of Joachim or Joseph Duewel, testified that he knew Joseph Duewel ever since he came from the old country; that he came and settled at Dundee and from Dundee he went to a farm between Plato and Sycamore; that he moved to another farm; that he had two places around there by Sycamore; that his wife was "Aunt Maria;" that he knew her; that

[illegible] irreflexive morals, was that she was 21 years of age.

Petitioner also produced as a witness one E. Hamsell, who testified that he was a practicing lawyer in Hickman, Kentucky, and governor of that state from 1920 to 1924. Mr. Hamsell testified to similar correspondence with Taylor, Hamsell and questions were asked by counsel for petitioner as to the contents of these letters. The objections are properly sustained for the reason, as is noted, that the qualitatively proof failed to show a tendency in good faith for the correspondence. Commonwealth v. Jackson, 204 Ky. 22.

Upon evidence produced that Hamsell is dead, letter of the Immanuel Lutheran church of Hickman, the testified that he had known C. Hunter in the neighborhood of Hickman on December 13, 1917, that a marriage ceremony was performed there at that time, that the bride's name was Lorelle Hunter, and that petitioner (Hunter) is Hunter, stated he was the minister of the church, was there at Hickman, Kentucky. The man who was married at that time was Joe H. Hunter. The witness testified that -- that time he was in the room though that only were strangers in that town he asked to act as the witness, and addressing the young man inquired if they were being married with the consent and good will of his parents. In which the young man replied in the affirmative; that he then addressed the young lady and asked her the same question and then Mr. Hunter spoke for her. The petitioner was allowed to testify this testimony.

Joseph E. Hunton, of Ohio, of age, his has lived in Hickman all his life, was whose mother was a sister of Joseph or Joseph Hunter, testified that he knew Joseph Hunter when he came from the old country; that he came and visited at Hickman and from which he went to a farm between there and Cayce; that he moved to another farm that he had two places where there by Joseph; that his wife was "first family" that he knew that that

he knew the children of Joseph and Maria Duewel; that Joseph Duewel lived on the John Demein farm a little west of Dundee; that he lived there a few years and then bought a farm from Mr. Lorenz, his son-in-law, who married the daughter Fredericka. The witness remembered the occasion of the wedding of Lorenz and Fredericka Duewel. He was there and it was a big wedding and all the family was there. It was the first wedding in the Duewel family. This was in 1881, and it took place on the Chris Demein farm at Joe Duewel's. The witness also said that he knew Augusta Duewel; that she died in 1883 or 1882 after the wedding. She lived on the John Demein farm and was buried in the Dundee cemetery; that he attended the service and that she was buried on her father's lot; that he never heard of her being married. He could not tell what relatives were at the funeral, but his folks were there and some of the near relatives, and that he never heard of a child being born to Augusta Duewel; that the funeral of Augusta was at Dundee and the services were conducted in the church by Rev. Steege; that he knew of the death of Mrs. Hauschild and attended her funeral; that he knew of the death of Joseph Duewel and attended his funeral and that of his wife Maria; that he knew of the death of Mrs. Lorenz and attended her funeral; that Augusta Fredericka Duewel might have been married without his knowing it but he doubted it; she might have had a child without his knowing it but it would be pretty hard to tell that. The witness did not know Mrs. Sophia Koester, thought she was related to the Duewels but didn't know how. He didn't know if there were any people from Wyandotte, Michigan, at the funeral. Johanna had a fair funeral; she was buried from the church. They had little to do with Mr. Duewel. He came over to see the folks, that is all the witness could tell about it, but he went to their home when he was real young, around 13, 14 or 15; he did not go there very often so he could not tell just what took place there.

Mrs. Anna Holtz, who was a sister of Joachim Duewel of Dundee, testified that she was acquainted with the family; that Joachim's wife's maiden name was Engenfer; that the children of Mrs. Marie Duewel were Mrs. Lorenz, Fredericka, Mrs. Minnie Krueger, Charles Duewel, Mrs. Carrie Hauschild, Augusta and Mrs. Mary Eggert; that Minnie Krueger is the only one living now; that the mother of the witness died three years before; that her mother never told her anything with reference to Augusta Duewel. Mr. and Mrs. Joseph Duewel used to go there. They just said she died when she was a young girl; that "Uncle Joe and my aunt lived right across the street from us up until the last eighteen years and then we lived across the river;" that she had never heard in their family that Augusta Duewel had been married; that she thought she would have heard about Johanna being married if that had been so; that she didn't think a secret wedding could "slip over" in Dundee without people finding out; that it didn't happen in Sycamore, but if it had happened in Sycamore she probably would not have heard of it; that her uncle used to come over to her house quite often, and if anybody else in the neighborhood knew about it she thinks she would have heard about it; that she wouldn't tell it to outside people; that if they had been married and nothing said outside of the immediate family, and Mr. and Mrs. Duewel had not told her mother about it she didn't suppose she would have heard about it; that she must have seen Augusta Duewel but she didn't have an independent recollection of having seen her.

Sophia Kemp testified that she was born in 1863 and her parents' name was Schroeder; that she was adopted in the family of John Demien and lived on his farm from the time she was eight years old until the was fifteen; that after she left, Joseph Duewel and his family moved on; that this John Demien farm was about four and a half miles northwest of Dundee; that she knew

Mrs. Anna Kuhn, who was a native of Joseph Hessel, of Dunker, testified that she was acquainted with the family; that Joseph's wife's maiden name was [illegible]; that the children of Mrs. Maria Hessel were Mrs. Furman, [illegible], Mrs. [illegible], Charles Hessel, Mrs. [illegible] [illegible], [illegible] and [illegible] Report; that [illegible] [illegible] in [illegible] [illegible] [illegible] that the mother of the children [illegible] [illegible] [illegible]; that [illegible] never told her anything with reference to [illegible] Hessel. [illegible] and Mrs. Joseph Hessel "used to go there, [illegible] [illegible] [illegible] [illegible] she was a young girl; that "[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the street from us we would [illegible] [illegible] [illegible] [illegible] we lived across the street;" that she had never heard in their family that Augusta Hessel had been married; that she thought she would have heard about [illegible] being married if there had been any; that she didn't know a [illegible] wedding [illegible] [illegible] [illegible] [illegible] out people [illegible] [illegible] that if [illegible] [illegible] [illegible], but if it had happened in [illegible] she would [illegible] [illegible] [illegible] [illegible] it [illegible]; that her [illegible] [illegible] it [illegible] [illegible] [illegible] [illegible] [illegible] [illegible], anybody else in the neighborhood [illegible] [illegible] if [illegible] [illegible] [illegible] would have heard about it; that she couldn't tell if [illegible] [illegible] people; that if they had been married [illegible] [illegible] [illegible] [illegible] of the [illegible] family, [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] mother; that if she didn't [illegible] she would have heard about it; that she [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] have an independent recollection of events years ago.

[illegible] [illegible] testified that she was born in [illegible] and her parents' name was [illegible]; [illegible] [illegible] [illegible] [illegible] in the family of [illegible] Hessel and lived in the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] years old until she was [illegible]; that after she left, Joseph Hessel and his family moved [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] about [illegible] and a half miles [illegible] [illegible] [illegible] [illegible] [illegible]

Joe Duewel and his wife and Fredericka Duewel, who married Chris Lorenz; that she was bridesmaid at their wedding, which took place on the Demien farm where the Duewels lived; that she knew a little about Augusta Duewel, not very much; that Augusta was alive at the time of the Lorenz wedding but she did not know how many years she lived after that; that Fredericka was married on quite a large farm located in Kane county near Dundee.

John J. Holtz, 67 years of age and born in Germany, testified that he came to this country when he was about six and a half years old; that his parents settled in Dundee and he worked on farms; that his mother's name was Mary Duewel, a sister of Joseph Duewel; that when Joe Duewel first came here he stayed with the Louis Grening's folks; that Joe Duewel lived on the Grening place, then moved to the Edwards farm in Dundee; that they then moved over to Sycamore and witness helped them move there; that he was about 17 or 18 years old then; that they had two cows which they drove along, and they stopped over night with the Schroeders; that Sycamore was southwest of the farm; that Joe Duewel moved back to the place where they stayed over night, which was known as the Thiess farm in Udinah in Plato township; that then Joe Duewel moved on the John Demien farm northwest of Dundee; that he knew Fredericka married Lorenz; that from that farm he moved to Dundee and was living in Dundee at the time he died.

Louis W. Duewel, who lived at Sycamore, testified that he was 46 years of age and his father was a brother of Joseph Duewel; that he knew some of the children, Charlie, Mary, Fredericka and Minnie; that he had met the petitioner Koester about two years before in his place of business in Sycamore and had a conversation with him; that Koester asked him if he was related to the Duewels at Dundee and the witness told him that he was, that he knew Joe Duewel, who was his uncle; that Koester

Joe Dwenel [illegible] Dwenel.

that he was intimately in their confidence, which [illegible] at the Dwenels. Jane where Joe Dwenel lived; that she [illegible] Augusta lover, and very much; that [illegible] was alive at the time of the latest [illegible] lived after that; that [illegible] from Augusta's [illegible] farm located in Jane County, near Dwenes.

John J. Smith, [illegible] testified that he was in this county [illegible] half years ago; that his brother resided in Dwenes [illegible] on farm; that his mother's name was Jane Smith; [illegible] Joseph Dwenel; that Joe Dwenel [illegible] the family Creeling's [illegible]; that [illegible] lived in [illegible] place, then moved to the Dwenes farm in Dwenes; that [illegible] moved over to Dwenes and [illegible] was about 17 or 18 years old [illegible]; that they [illegible] along, and they [illegible] that Dwenes was [illegible] of his [illegible] back to the place where they [illegible], which was known as the Dwenes farm in Dwenes County; that [illegible] Dwenel moved on the farm [illegible] of Dwenes; that he knew [illegible] Dwenes and was living in Dwenes at the time he died.

Louis V. Dwenel, who lives at Dwenes, testified that he was 19 years of age [illegible] brother of Joseph Dwenel; that he knew some of the witnesses, Creeling, Smith, Brewerhide and Minnie; that he [illegible] about two years before he was seen at business in Dwenes; [illegible] had a conversation with him; [illegible] related to the homicide. [illegible] he was, that he knew Joe Dwenel, [illegible] Dwenes

said he was his uncle also on Joe Duewel's wife's side, that his mother was a sister of Mrs. Joe Duewel. The witness said that was about two years ago and that Koester mentioned an estate he was interested in; that Koester asked him if he didn't remember the Joe Duewel family; that Koester didn't say that Johanna Duewel, the daughter of Joe Duewel, was his mother; he said Joe Duewel was his uncle.

C. W. Rakow, a retired merchant 72 years of age, living at Dundee, Illinois, since 1868, testified that as a young man he worked on a farm, and after he was a farmer he was a coachman for Dr. E. F. Cleveland of Dundee and knew Joe Duewel of Dundee, he thinks, since 1871; that Joe Duewel's wife's maiden name was Engenfer; that he knew some of the children in that family - Charlie, Mrs. Hauschild, Mrs. Eggert, Mrs. Krueger and Mrs. Lorenz; that there was not another girl in that family that he knew of. He recalled driving the doctor out to the Duewel farm on an occasion of illness when a daughter by the name of Augusta was sick; that at that time he was 25 years old; that he didn't know what was the trouble with the little girl; that the Joe Duewel family at that time was living on a farm about four miles northwest of Dundee, on John Damien's farm; that the little girl was not sick long; that she was about thirteen years and some months of age when she died; that they had no embalmer or undertaker in the town at that time, and his mother used to do a lot of such things; that his sister and mother went out into the country to the farm and did the work for the people there to lay her out, dressed the little girl and laid her out; that she was buried in the West Dundee cemetery; that after that time he was coachman 10½ years for a doctor and then in 1893 he went into the furniture and undertaking business; that he buried Mrs. Hauschild, Mr. Joe Duewel and Mrs. Duewel and he had been out and seen their family lot a number of times; that he was

[illegible]

[illegible]

at the cemetery in 1885; that he didn't know the date of Johanna Augusta's death but believed it was in the fall of the year; that the doctor he worked for traveled in all directions and had a very large practice; that as he recollected, Johanna Augusta died in 1883; that he had to work around the barn a great deal; that there was lots to do and Mr. Duewel, the girl's father, came over to where he was at the barn and asked him to tell the doctor that the little girl had died and he need not come again; that he remembered those details very distinctly; that on the day this little girl died he made only one call; he drove him out there; that they only went out there once because the little girl had died; that of his own recollection he does not know about this girl's age exactly, but her father told him and nobody else gave him the information at the time when she died, and the father told him to tell the doctor not to come out again because the little girl had died.

Rosie Jennings testified that Edwin B. Jennings was a cousin of her husband; that she is the mother of Charles Jennings and one of the heirs; that she knew Edwin B. Jennings' father and mother; that his father's name was John D. and his mother's name was Anna; that he lived in the Southern hotel at 22nd street and Wabash avenue in Chicago, just a block from the Lexington hotel located at 22nd street and Michigan avenue; that she knew Edwin B. Jennings for many years up to the time he died; that he came to their house very often, and they were always friendly and on good terms with him; that there was a reputation in the family as to whether or not Edwin B. Jennings was married and that tradition was that he was never married; that she never had heard anything in the family of Edwin B. Jennings to the effect that he ever married. The witness said he was not a talkative man, very quiet in a way, didn't talk about his private affairs to anybody and didn't talk about his private affairs to her; that she hardly thought he could be

married and not tell it to her; that she was in the family councils quite a good deal around in 1885 but was not taken into the intimate family discussions; that she knows that Edwin B. Jennings made trips with his parents but doesn't think that he went quite as often as once a month.

Sarah T. Jennings, 70 years of age, lived in Chicago since 1879, was married to Samuel H. Jennings, and her husband, who died eight years before, was a first cousin to Edwin B. Jennings, whom she had known since 1885; that Edwin B. Jennings visited her house, knew where the key was, and she would come home and find him there; that he died at St. Luke's hospital and she visited him there quite often because he was glad to see her and have her come; that after the death of his father and mother he came to see her two or three times a week; that she did his mending, lined his coats when they looked so ragged she didn't want to see them; that she had visited his mother and liked her very much and his mother visited at her house; that there was a reputation in the family as to Edwin B. Jennings to the effect, as she says, that "he was a stingy old bachelor."

Mrs. Nellie D. Bachelder, who lived at the Lexington hotel, said that she was married in 1881 and after her marriage went to live at the Southern hotel; that her husband built the hotel and was running it when she was married and they went there to live; that she knew Edwin B. Jennings from the year 1881 until he died; that his family lived there several years before she was married; that he had an aunt, "Eliza Brizee," one of the principal ones in the family, who looked after them all; that this aunt took care of the two boys; that John D. Jennings passed away in 1889; that this aunt died in 1891 and Miss Brizee in 1893. She says, "They were with us all the time up to that time from '81; from '81 until they died they lived with us in the same hotel; there was rarely a day

she

I did not see them;" that Edwin B. Jennings from 1881 up to the death of his father and mother lived in the Southern hotel and he was supported by his father; that after his father's death he lived with his mother until she passed away and then he went, as she says, "with us over to the Lexington hotel;" that Edwin B. Jennings occupied the same rooms with them from 1891 until 1893 or 1894; that he left the hotel and went to live with Mr. and Mrs. Johnson, with whom he lived until he went to the hospital; that he was always home; that he sort of joked and talked about the subject of marriage but never went out with young ladies; he was always home. She said on cross-examination she couldn't answer whether he was home every day in 1884 honestly, but she used to see him every day; she thought she saw him every day in 1886 and the same in 1887, 1888, 1889 and 1890.

Nellie Johnson testified that she had known Edwin B. Jennings for about forty years and that he and her husband were well acquainted and Edwin B. Jennings lived in their family, first in 1897 at 5021 Calumet avenue, and from there they moved to 2406 Prairie avenue, and Edwin B. Jennings came with them and lived there continuously from 1898 until he died; that she knew Frank Jennings, the brother of Edwin B., and Frank called at their home one day to see his brother, who was out; that witness, her husband and Frank Jennings were there and no one else, and Frank said, "Why, this is the house he bought--" (meaning the house Mr. Jennings bought), and her husband said, "Yes, this is the house he bought." Frank said it was a good thing his brother never got married because he didn't feel he could afford to keep a wife. She said that in 1918 Edwin B. Jennings never had any boys in uniform over to the house on Prairie avenue; that there was never but one boy that came there and he was Jay Henderson, whose father was an attorney and who lived at the corner of 24th street and Calumet avenue, a neighbor

boy; that once in awhile Mr. Jennings brought in gentlemen friends to a meal - Mr. Huyck and Mr. Reed, George Ade's brother; that she knew everyone he ever brought there and he introduced her to them; that it was hard to tell what her position was in that house; she was maid of all work and nurse and a little of everything; that Edwin B. Jennings did not pay for the upkeep of the house but he roomed and boarded with her; that he did not pay her so much a week but gave her the rent of the house and that was all; that he was quite liberal with his money. When asked if he owed her a large sum of money she said, "Well, I think I am deserving. If you knew all you would think so." She said she thought Jennings' heirs were charitable enough to know she was deserving; that every word she said was true; that she was interested in the suit this much, that she thought the relatives should get what was coming to them.

Martin F. Huyck, who was in the real estate business at Battle Creek, Michigan, and secretary and treasurer of the Brownlee Park Gravel & Material company, testified that he first met Edwin B. Jennings when the witness was fourteen years old, an office boy in Chicago; that Jennings was then a young man of about 39; that the witness was born and raised in Chicago and had lived there all his life except the last eighteen years; that he had business dealings with Edwin B. Jennings beginning in 1903, and they continued up to a period within a few months of his death; that the witness was secretary and treasurer of the Jennings Land Company, in which Edwin B. Jennings was interested and a stockholder and director; that for ten years at least he saw him continuously every week; that they were engaged in constructing homes, developing subdivisions and negotiating loans for Mr. Jennings, and in the sale of homes after they were developed; that he traveled from coast to coast with Mr. Jennings at least ten times during the period from 1903 to 1915. He was acquainted with members of his family and his heirs; had con-

bey; that once in Dublin Mr. Dowling's family [illegible] visiting as a maid - Mr. Lynch and Mr. Head, having had a [illegible] and [illegible] everyone he was broke; there was [illegible] that it was hard to tell what the qualities were in that lonely old man made of all work and worse and a little or nothing [illegible]. Jennings did not pay for the dinner or the wine but he [illegible] bowered with them; that he [illegible] and gave her the rest of the house and that she fell; that he was [illegible] with his money. [illegible] Dublin. [illegible] said, "Well, I [illegible]." [illegible] Dublin so." The man was [illegible] enough to take one was [illegible] that they are interested in the [illegible] relatives would get [illegible] it [illegible].

Early in April, one year to the day, [illegible] at Dublin [illegible], minister, and [illegible] President of the Dowling Law Land Court a [illegible] company, [illegible] Edwin D. Dowling [illegible] the company was [illegible] by in [illegible]; that [illegible] was [illegible] the witness was [illegible] and [illegible] his life [illegible] the last eighteen years; "[illegible] Dowling [illegible] ing with [illegible] Dowling [illegible] up to a point within a few months of his death; that the witness was secretary and treasurer of the Dowling Company, in which Edwin D. Dowling was interested and a [illegible] was interested; that for ten years or least he saw his [illegible] every [illegible] they were engaged in [illegible] [illegible] and [illegible] after they were [illegible] Mr. Dowling at least [illegible] [illegible]. He was acquainted with members of his [illegible] family; and com-

versations with Edwin B. Jennings on the subject of whether or not he had ever been married; that on that occasion Edwin said he was not married, had no issue, and was not expecting to be married. This witness also testified that he had seen Edwin B. Jennings write and that he could not write or speak German to his knowledge.

Frank G. Gardner, treasurer of the Chicago Title & Trust Company, testified that he had known Edwin B. Jennings from 1906 to the time of his death; that the Chicago Title & Trust Company was trustee under the will of Edwin B. Jennings' father and Edwin B. Jennings was the beneficiary of that estate. The witness met him in connection with the affairs of that estate, paid him his income quarterly, consulted with him frequently about investments and about the sale of real estate; had conversations with Mr. Jennings as to whether he had been married or not, and as near as he could remember it was 7, 8, 9 or 10 years before he died and in the office, when Jennings was sitting at his desk one day, and the witness said, "Ed, why in thunder is it you never got married?" and he said, as near as he could remember, "I never have married because I know perfectly well that no woman would ever marry me for anything except my money." On cross-examination witness said he knew Jennings was a bachelor from knowledge and conversations with him and that if Mr. Jennings had an affair in his life he never heard him talk about any and didn't know what he would have done.

Howard A. Jennings, 66 years of age, born in Media, 7 miles north of Logansport, Indiana, testified he came to Chicago when he was three years old and has lived here ever since and knew Edwin B. Jennings, who was his third cousin; that from 1871 until 1885 or 1886 witness lived in Englewood; that Edwin lived at 22nd and Wabash, probably five miles apart; that he knew the father and mother of Edwin B., his brothers and his uncle Samuel A., who are

veterans with John E. Jennings as the latest [illegible] to
be had ever been seeking; some no doubt [illegible] but he was
not married, had no [illegible], and was not [illegible] in [illegible].
This element also [illegible] that he had [illegible] E. Jennings
will, and that he could not write or [illegible] in his [illegible].

Frank S. Gardner, treasurer of the [illegible]
Trust Company, testified that he had known John E. Jennings from
1904 to the time of his death; that he [illegible] Julia A. Jen-
ning the [illegible] after the will [illegible] "Jennings" [illegible] the
John E. Jennings was the beneficiary of [illegible] policies. The witness
met his in connection with the affairs of [illegible] Jennings, [illegible]
his income [illegible]. [illegible] [illegible] [illegible]
[illegible] and about the date of that [illegible] [illegible]
Jennings as to whether he had been [illegible] or not, and if [illegible]
he could remember it was 7, 6, 5 or 4 [illegible] [illegible]
the office, when Jennings was [illegible] [illegible]
[illegible] said, "Mr. [illegible] is [illegible]
and he said, as near as he [illegible], "I [illegible]
because I know positively will that [illegible] [illegible]
for anything [illegible] [illegible]" [illegible]
he knew Jennings was a [illegible] [illegible]
with him and that if [illegible] Jennings had [illegible]
never heard the talk about any [illegible] [illegible]
[illegible].

Edward A. Jennings, 32 years of age, born in Indiana,
7 miles north of Logansport, Indiana, testified he came to Chicago
when he was three years old and has lived here ever since. He knew
John E. Jennings, who was his uncle [illegible] [illegible]
[illegible] or [illegible] [illegible] [illegible] [illegible]
and Wabash, probably five minutes apart; [illegible] [illegible]
mother of John E., his brothers and his uncle [illegible] E., who are

all dead; that the relationship between the families was close; that they were associated ever since witness was a baby until the time they all died; that he was assistant cashier and auditor for Armour & Company for 30 years when he quit; that he last saw Edwin B. Jennings in 1923 when witness went to California; he said he was well acquainted with the reputation in the family as to Edwin B. Jennings, and it was that he was a bachelor; witness said that Edwin B. Jennings was not married and he was very sure he would know; that he had conversations with him very often as to whether or not he was married; that at one time in particular, in 1920, witness met Jennings on LaSalle street and he was telling about a mutual friend who had married, when the witness asked him, "Ed, why in the world don't you get married?" and he said he never intended to get married. This witness further testified that Edwin B. Jennings lived in Chicago; that he never lived in Sycamore or Dundee, Illinois; that he was born in Chicago and "this was his home during his entire life." Edwin B. Jennings had never said anything to him about an affair in 1885, and at that time he was with him constantly, he wouldn't say every day but every week; that in 1885 and 1886 they were together all the time; he says that Edwin B. Jennings was probably as confidential with him as his own brother, because they were brought up together and he was there a good deal; that if Jennings had an affair and a wife, he was not the kind of person who would talk about it, but Jennings would often say things to him and ask him questions to relieve his mind, maybe, on some business thing or something of that kind; that he thinks if he talked to anybody about his personal affairs he would have talked to the witness.

Fred W. Cooper, a mortgage banker, who lived in Chicago 28 years, testified that he knew Edwin B. Jennings very well in his lifetime; that his firm had extensive relations with him

all dead; that the relationship between the families was close; that they were associated more than a lunch or a day until the time they all died; that he was anxious to secure for Armour a company for a young man by name; that he knew Armour's mother.

E. Jennings in 1873 was twenty-four; he is described as was well acquainted with the (illegible) in the family as to which E. Jennings, and it was they to have a homestead; [illegible] that Edwin R. Jennings was not married at the time; more he could know; that he had correspondence with the [illegible] or not he was married; that at the time he [illegible], at these not Jennings on [illegible] he was talking about a middle friend who had married, when the witness said, "Oh, why in the world don't you get married?" and he said he never intended to get married. This witness testified that John R. Jennings lived in Chicago; that he never lived in Omaha or Dundee, Illinois; that he was born in Illinois and "was his home during his entire life." Edwin R. Jennings had never said anything to him about an affair in 1873, and at that time he was with his constantly, he would [illegible] any event, the last [illegible]; that in 1873 and 1874 they were together all the time; he is the [illegible] E. Jennings was [illegible] or confidential with him as his own brother, because they were always together and he was more a good deal, that if Jennings had an affair and a wife, he was not; the kind of person she would tell about it, but Jennings would give her things to do, and ask him questions to relieve his mind, maybe, or some relative using or something of that kind; that he never at he talked to anybody about his personal affairs he would have talked to the witness.

John E. Jenner, a [illegible] person, was living in Chicago 40 years, testified that he knew Edwin R. Jennings very well [illegible]; that his firm had extensive relations with his

running into hundreds of thousands of dollars; that he was one of the pallbearers at his funeral; that he had had social relations with him; that Jennings was at his house for dinner over a long period of years, probably every week or ten days or so, and he remembered the occasion of his death at St. Luke's hospital; that two or three years previous to his death he had a conversation with Jennings as to whether or not he had married; that he answered that he had never been married and never expected to be, and "marriage is all right for you fellows who are married and have fine families, but not for mine."

It was proved that upon a hearing before Judge Horner in January, 1928, the witness, Mamie Haas, was asked, "Didn't you tell Neal Williams that Mr. Koester was a son of August Koester and Sophia Koester?" and she answered, "I did."

It is apparent that most of this evidence which we have recited, offered in behalf of petitioner as well as of respondents, would ordinarily be inadmissible. The general rule is, as stated in Jarchow v. Grosse, 257 Ill. 36, that declarations of persons can be admitted to prove pedigree after it has been established (1) that the declarant is dead; (2) that the declarations were made before the controversy arose; and (3) that the declarant was related by blood or marriage to the persons to whom the declarations refer. It is, however, also the rule, and for obvious reasons must be, that such declarations are received with the greatest caution and must be examined and weighed with the greatest possible care. The evidence is hearsay. Such declarations cannot be subjected to the test of cross-examination. That petitioner's reputation is not the best; that he has been a party to other attempts to get this large estate in proceedings inconsistent with this one; that the principal witnesses here were also apparently his willing witnesses in former proceedings - giving

[illegible] into hundreds of [illegible]; [illegible] the [illegible] of the policemen in the [illegible]; [illegible] [illegible] [illegible] with him; that Jennings was at his house for [illegible] [illegible] a long period of years, probably [illegible] or the [illegible] or so, and [illegible] remembered the occasion of his [illegible] at Mr. Lane's [illegible] [illegible] two or three years previous to this [illegible] had a conversation with Jennings as to whether or not he had anything; that he answered that he had never been married and never expected to be, and that there is all right for you fellows who are married and have your families, but not for me."

It was proved that upon a [illegible] before Judge [illegible] in January, 1920, the witness, Bessie Lane, was asked, "Didn't you tell Lord Fitzhugh that Mr. Webster was an [illegible] [illegible] and Jennie Rosenberg" and she answered, "I did."

It is apparent that most of the [illegible] [illegible] have results, altered in length or positions so as to be of responsive, [illegible] to [illegible]. The general rule is, as stated in [illegible] v. [illegible], 187 [illegible] 56, that [illegible] of persons can be admitted in proof relative after it has been established (1) that the statement is true; (2) that the [illegible] were made before the [illegible]; and (3) that the declarant was related by blood or marriage to the persons in whom the declarations refer. It is, however, [illegible] [illegible], and for obvious reasons must be, that such declarations are received with the greatest caution and must be considered and weighed with the greatest possible care. The evidence is strong. Some [illegible] [illegible] cannot be [illegible] to the test of cross-examination. That petitioner's reputation is not the [illegible]; [illegible] [illegible] to other attempts in the [illegible] to prosecuting [illegible] [illegible] with this [illegible]; that the [illegible] witnesses were [illegible] [illegible] [illegible] - [illegible]

contradictory testimony - must go very far towards discrediting the evidence which is now submitted in his behalf.

We can not believe the story of the alleged marriage of Jennings to Augusta Duewel. It is related by a witness who tells of an improbable journey from Chicago to Sycamore in 1885, and of a wedding which (on petitioner's theory) it was the intention of the parties interested should be kept secret but which she, a child of twelve, was permitted to witness. She says she made the journey to Sycamore to her cousins, the Allens, and that she visited for about three weeks with them on the farm of John Allen. She has not seen the Allens since. She does not know where any of the Allens are. She does not name a single person who can corroborate her story. Minnie Krueger, sister of Augusta and the only member of her immediate family now living, who in all probability would have known of such a wedding had it occurred, was suffering with a broken hip at the time of the trial and did not testify. Not a circumstance is related tending to show how Edwin B. Jennings who lived in Chicago all his life, came to know or associate with this young girl living in a rural community. The interest of such a community in such an occurrence would have been intense, and it is difficult to believe that it could have occurred under circumstances such as are related without coming to be generally known. There is an atmosphere of unreality about the whole affair which compels the belief that the story is fictitious.

Even less credible is the evidence tending to show that petitioner is the child of Edwin B. Jennings and Augusta Duewel. It rests entirely upon hearsay, admissible under the exception which permits pedigree to be proved by such evidence. If the birth of the petitioner had in fact occurred as alleged, it is highly probable that the knowledge of it and the tradition arising therefrom would have become known to the entire rural

[illegible] testimony - must go very far towards discrediting the evidence which is now submitted in his behalf.

We need not believe the story of the alleged marriage of Jennings to Augusta Rowell. It is related by a witness, who tells of an improbable journey from Chicago to Sycamore in 1856, and of a wedding which (on petitioner's theory) is the [illegible] of one [illegible] [illegible] and at which she, a child of twelve, was permitted to witness. She says she made the journey to Sycamore to see relatives, her aunts, and that she visited for about three years with them on the farm of John Allen. She has not seen the Allens since. She did not know whether any of the Allens are [illegible]. She does not name a single person who can corroborate her story. Annie Brewer, sister of Augusta and the only member of her family now living, who in all probability would have known of such a wedding had it occurred, was [illegible] with a [illegible] [illegible] at the time of the trial [illegible] [illegible]. Likely, not a circumstance in the alleged wedding, is that [illegible] [illegible], who lived in Chicago all his life, came to such an intimacy with this young girl living in a rural community. The [illegible] of such a [illegible] in such a community would have been [illegible], and it is difficult to believe that it could have occurred under circumstances such as are related without coming to be generally known. There is an atmosphere of unreality about the whole affair which compels the belief that the story is fictitious.

Even less credible is the evidence tending to show that [illegible] in the [illegible] of [illegible] v. Jennings and Augusta Rowell. It rests entirely upon memory, unsupported except [illegible] [illegible] [illegible] to be proved by such evidence. If the [illegible] of the [illegible] [illegible] [illegible] is [illegible], it is highly probable that the knowledge of it and the tradition relating thereto would have been known to the entire rural

community where it is said to have occurred. Here again Minnie Krueger would almost certainly have had knowledge, and the absence of her testimony is unusually significant. If we assume the story of Agnes Myers to be true, it would seem highly improbable that Jennings, the husband and father, would have been absent at the birth of his son and the death of his wife. Not one witness except Agnes Myers is produced to show his presence in this rural community at these times or indeed at any time before or after the supposed wedding. He is seen by Agnes Myers. He disappears. He does not return. The story has an atmosphere of unreality. Again assuming the wedding occurred, and the child was born, he had the right to its custody and control. Why choose Sophia Koester to mother his son? There is no evidence that before this he had ever met her or knew anything about her disposition or character. The hearsay testimony is that Maria Duewel, the grandmother, wished to keep the child but that the grandfather Joseph refused to give his consent. There is no adequate motive for such conduct. It is difficult to believe any father would thus cast away the helpless child of a girl-wife daughter who had just died in childbirth. Humans do not usually act that way. There was no adequate motive (assuming petitioner's theory to be true) why either Joseph Duewel or Jennings should act as petitioner's evidence would indicate they acted. If the marriage ceremony was performed the child was legitimate. The disgrace which might be supposed to supply a motive for such conduct had been removed.

Mary Stahl Warner's testimony is contradicted not alone by witnesses for respondents but by those for the petitioner. Evidence for petitioner is not consistent. The letters written in English at Chicago are in German when read in Michigan. Mrs. Warner is apparently an intelligent woman who would understand something of the value of evidence. Mrs. Sophia Koester, according

to the testimony of one of petitioner's witnesses, consulted a lawyer in Michigan long before her death. She also seems to have been intelligent. Yet no letter is preserved. The supposed letters to the Governor of Mississippi are not found. We are asked to believe that Jennings for more than thirty years had been making visits to see his son in Michigan and had been sending money from time to time to the foster mother of his son in order that he might be properly cared for; that the son on numerous occasions visited him at Chicago; that his father bought and sent clothing to him, - yet not one word of script - not a piece of paper is to be found from which such relationship could in any way be inferred. It is a most improbable story that the trial court was asked to believe. Respondents insist it was fabricated. We have no doubt that it was. The trial court saw the witnesses and weighed the testimony. The court was justified in finding that no marriage ever took place between Edwin B. Jennings and Johanna Duewel and that petitioner is not their child. The question for us to decide is whether the finding is manifestly against the evidence. We find it is not.

The judgment of the Circuit court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

to the testimony of one of antikanar's witnesses, requiring a lawyer to maintain also entire her person. She also seems to have been intelligent. Yet no doubt is questioned. The sentence interfere to the governor of Massachusetts and by them. We are asked to believe that Jackson (or that that matter, anyone) had the motive, ability to see his son in prison and then, knowing nothing time to time so the lawyer answer of his son to state that he might be property cause for; that he was so anxious concerning whether she at Dedham; that his father (well, anyone) knowing - yet not one word of doubt - and a person in fact is in jeopardy free which just relationship would to supply the [illegible]. It is a most improbable story that the trial where the jurist to confess, Hangmanhorn insist it was fabricated. Perhaps he knew that it was. The trial court was the [illegible] testimony. The court was justified in finding that [illegible] place between John G. Jackson and John [illegible] tiner in his that child. The question [illegible] to decide whether the finding is warranted [illegible] the testimony. We find it is not.

The judgment of the [illegible] court is affirmed.

[illegible].

O'Neill, R. J., and [illegible], J., dissent.

33117

SYLVIA R. GERSON, Formerly)
SYLVIA R. MATHES,)
Appellee,)
va.) APPEAL FROM CIRCUIT COURT
) OF COOK COUNTY.
SAM A. MATHES,)
Appellant.)

2507

252 I.A. 660[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The questions arising in this appeal are between the same parties and are controlled by the opinion this day filed in general number 33116.

After the appeal from the order of June 13, 1927, which we have reversed, Sylvia R. Mathes on June 19, 1928, filed another petition, in which she recited the prior proceedings and the appeal from that order, represented that she had no property or income of her own to defend the appeal, and prayed that another order for furthersolicitor's fees should be entered. The defendant answered this petition, and thereafter on June 29, 1928, another order was entered by the court granting the prayer of complainant's petition and directing the payment to her of a further sum of $250 for solicitor's fees in defending that appeal. An appeal was prayed and allowed from that order and the causes were consolidated in this court for hearing. Obviously, for the same reasons stated in the opinion filed, this order also must be reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

33337

AETNA ACCEPTANCE CO.,
a Corporation,
Appellee,

vs.

J. E. SHAMPAY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

252 I.A. 661

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $669.39 entered upon the verdict of a jury as instructed by the court. There was a motion for a new trial supported by an affidavit alleging newly discovered evidence, which was denied. The suit was begun by confession of judgment, which, on motion of defendant supported by a verified petition, was set aside and an order was entered that the petition should stand as an affidavit of merits to the statement of claim.

The affidavit averred that on December 11, 1925, defendant purchased a Ford truck for the specific purpose communicated to the seller before the sale, that it was to be used in connection with a dry cleaning establishment for hauling articles to the plant to be cleaned and back to the customers; that the purchase price was $1,145, upon which petitioner paid $334 and signed and delivered the note, upon which judgment was entered, in payment of the balance; that defendant executed a chattel mortgage on the truck on the same date; that the truck was top-heavy, unwieldy, and petitioner was obliged to discontinue the use of it and notified the seller to take the truck back, which was done on February 16, 1926; that on February 10, 1926, petitioner received notice of foreclosure from plaintiff; that on February 21, 1926, petitioner received statement of chattel mortgage sale held February 17, 1926, and that the truck had been sold to one J. Burt of Waukegan for $250, making a deficiency of

[illegible]

[illegible] Co.,
a corporation,
Appellee,

vs.

J. [illegible] McCarty,
Appellant.

[illegible]

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal by the defendant from a judgment rendered in the sum of $[illegible] against the appellee at a jury trial instituted by the court. There was a [illegible] by an affidavit alleging many [illegible] defenses, which the plaintiff [illegible]. The suit was begun by [illegible] motion of defendant supported by a [illegible] made and an order was entered that the [illegible] affidavit of merits in the [illegible].

The affidavit merits filed on December 11, 1921, the defendant [illegible] a jury trial for the [illegible] in the matter before the court, and it was [illegible] with a jury [illegible] to be [illegible] was $[illegible], upon [illegible] the [illegible] that [illegible] date; that the truck [illegible] obligated to discontinue the use of it and notified the [illegible] the truck back, which was done on [illegible] 10, 1920, [illegible] that on February 11, 1920, [illegible] [illegible] [illegible] [illegible] [illegible]

$609.64; that petitioner claimed no chattel mortgage sale was ever held and that plaintiff had been offering the truck for sale at all times since the delivery of the truck to petitioner.

An examination of the record fails to show any proof tending to sustain the material averments of the defense set up by the affidavit. On the contrary, it appears affirmatively that there was a foreclosure sale, and there is no proof whatsoever that defendant at any time made any complaint that the truck was not as represented.

Error is assigned but not argued as to the admission and rejection of evidence. The defendant cites section 26 of chap. 95 of the Illinois Revised Statutes, which provides that all notes secured by chattel mortgage shall state that they are so secured, and when assigned by the payee shall be subject to all defenses existing between the payee and payor of such notes the same as if such notes were held by the payee, and that any chattel mortgage securing notes not stating upon their face the fact of such security shall be absolutely void. Ballard v. Byerly, 233 Ill. App. 522. That section is not applicable here because the chattel mortgage and note are in the hands of the original payee who sues thereon. Hogan v. Akin, 181 Ill. 448; Sellers v. Thomas, 185 Ill. 384.

The defendant also argues that a new trial should have been granted because of newly discovered evidence, but the affidavit submitted in support of that motion fails to allege any diligence whatsoever on the part of defendant. Indeed it appears therefrom that upon the exercise of due diligence such new evidence could have been obtained upon the trial.

As there is no error in the record the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that af rwards, to-wit: On the opinion c the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7928 Agenda No. 5

In The

APPELLATE COURT OF ILLINOIS,

Second District.

MAY TERM, A. D., 1928.

DOROTHY L. BRUMBACH, Plaintiff in Error,	)	
v.	)	Error to Circuit Court La Salle County.
ILLINOIS POWER & LIGHT, CORPORATION, a Corporation, Defendant in Error.	)	

OPINION by BOGGS, J.

An action on the case was instituted by plaintiff in error, hereinafter called plaintiff, against defendant in error, hereinafter called defendant, in the circuit court of La Salle county, to recover for injuries alleged to have been sustained by plaintiff coming in contact with a broken electric wire.

The declaration consists of one original and two additional counts. The original count charges that defendant was operating an electric light system in the city of Ottawa, "that it was the duty of said defendant to keep said wires properly insulated and suspended upon said upright poles in proper repair so that the same would not fall down upon or near the ground and transmit deadly electric current through wires endangering lives of persons passing along said streets; that defendant carelessly and negligently neglected its aforesaid duty, * * * by reason whereof wires fell and sagged across Lafayette Street at the intersection with Paul Street and while in such condition, on, to-wit, October 3, 1924, the wires were carrying deadly current and while plaintiff was walking along sidewalk on north side of Lafayette street at its

General No. 7928 Agenda No. 5

In The

APPELLATE COURT OF ILLINOIS,

Second District.

MAY TERM, A. D., 1928.

DOROTHY L. RUTENBACH, Plaintiff in Error,	
v.	Error to Circuit Court of Lake County.
ILLINOIS POWER & LIGHT CORPORATION, a Corporation, Defendant in Error.	

OPINION BY MOORE, J.

An action on the case was instituted by plaintiff in error, hereinafter called plaintiff, against defendant in error, hereinafter called defendant, in the circuit court of Lake county, to recover for injuries alleged to have been sustained by plaintiff coming in contact with a broken electric line.

The declaration consists of one original and two additional counts. The original count charges that defendant was operating an electric light system in the city of Waukegan, that it was the duty of said defendant to keep said wires properly insulated and suspended upon said upright poles in proper repair so that the same would not fall down upon or near the ground and transmit deadly electric current through other substantial lives of persons passing along said streets; that defendant carelessly and negligently neglected its aforesaid duty, [illegible] wherefore wires fell and sagged across Lafayette street at the intersection with Paul Street and while in such condition, on, to-wit, October 3, 1924, the wires were carrying deadly current and while plaintiff was walking along sidewalk on north side of Lafayette street at its

intersestion with Paul street, through said negligence in permitting said poles to be and remain in aforesaid condition for a space of, to-wit, two hours, while plaintiff was in exercise of all due care and caution for her own safety, she came in contact with said insulated wire and current passed to and through her body and threw her violently upon the ground," causing the injuries, etc., for which she brings suit.

The first additional count is in effect the same as the Original count, except that it alleges "that said wires, being uninsulated and defectively supported, were permitted to sag across the intersection of Lafayette street and Paul street at about six feet from the sidewalk," etc. The third count is the same as the first, except that it charges "that the wires conducting said electric current sagged or broke, and that it was the duty of the defendant to shut off the current," etc., and that it failed to exercise reasonable care in this behalf.

To said declaration, defendant filed a plea of the general issue. A trial was had, resulting in a verdict in favor of defendant and judgment against plaintiff for costs. To reverse said judgment, this writ of error is prosecuted.

The unindisputed evidence is to the effect that plaintiff at the time of said injury was between 17 and 18 years of age; she was employed by the Postal Telegraph company of said city and was living at 306 east Lafayette street, which street runs east and west, intersecting Paul street, which runs north and south and which is about one block west of her place of residence. She was living with her brother, mother and sister. Her father lived in Ottawa, but was not residing with the family. On the day in question, she had worked, finishing her duties at eight o'clock in the evening. She attended the Orpheum Theatre with her father. From there she went with her father to the office of the Postal Telegraph and then to the Appellate Court building at the corner of Lafayette and Columbus avenue, about two blocks west of plaintiff's home. At this point her father left her, and she proceeded easterly on

intersection with Paul street, thereby causing her to permit-
ting said poles to be and remain in aforesaid condition for a
space of, to-wit, two hours, while plaintiff was in exercise of
all due care and caution for her own safety, did come in contact
with said insulated wire and current passed to and through her
body and threw her violently upon the ground," causing the injuries,
etc., for which she brings suit.

The first additional count is in effect the same as the
Original count, except that it alleges that said wires, being un-
insulated and defectively supported, were permitted to sag across
the intersection of Lafayette street and Paul street so about six
feet from the sidewalk," etc. The third count is the same as the
first, except that it charges that the wires conducting said
electric current sagged or broke, and that it was the duty of
the defendant to shut off the current," etc., and that it failed to
exercise reasonable care in this behalf.

To said additional, defendant filed a plea of the general
issue. A trial was had, resulting in a verdict in favor of defen-
dant and judgment against plaintiff for costs. To reverse said
judgment, this writ of error is prosecuted.

The undisputed evidence is to the effect that plaintiff
at the time of said injury was between 17 and 18 years of age; she
was employed by the Postal Telegraph company of said city and was
living at 306 east Lafayette street, which street runs east and
west, intersecting Paul street, which runs north and south and
which is about one block west of her place of residence. She was
living with her brother, mother and sister. Her father lived in
Ottawa, but was not residing with the family. On the day in question
she had worked, finishing her duties at eight o'clock in the evening.
She attended the Orpheum Theatre with her father. From there she
went with her father to the offices of the Postal Telegraph and
then to the Appellate Court building at the corner of Lafayette and
Columbus avenue, about two blocks west of plaintiff's home. At
this point her father left her, and she proceeded westerly on

Lafayette street toward her home. At the northwest corner of Lafayette and Paul Streets, she was found by her brother between ten and eleven o'clock in a semi-conscious condition. Her face was bruised, her eyes blackened, her nose mashed, and four of her teeth had been knocked out.

It is the contention of plaintiff that she came in contact with a broken wire, which was hanging near the sidewalk on the north side of Lafayette street and that the shock therefrom had thrown her to the ground, causing the injuries in question. On the other hand, defendant insists that plaintiff was assaulted and that her injuries resulted therefrom.

It is first insisted by counsel for plaintiff that the verdict is against the manifest weight of the evidence.

Plaintiff testified that she and her father "went back to the station after the show, and started home * * * on west side of Columbus street and father went back to Leix's Hotel. I walked up to the northeast corner of the park at Columbus and Lafayette streets, crossed to the north side of Lafayette at Appellate Court corner. There was a light just south of the Appellate Courthouse. There was no light on the next corner. Paul, Lafayette and Columbus streets are all paved with brick and have concrete curbing. I walked on the north side of Lafayette street; nobody was behind me, nor did I see anybody about there at that time. While not exactly pitch-dark, it was so dark that you could not see very well. * * * I was walking east on the north side of Lafayette street singing to myself. As I came to the corner I saw no light there, but I was not afraid, and then I don't remember what happened. I came faintly to myself; remember getting upon one knee and trying to get up. I don't remember anything more. The first thing I remember after that was my brother trying to pick me up. He was talking to me; calling my name.

Plaintiff's mother testified that about eleven o'clock

Lafayette street toward her home. In the northeast corner of Lafayette and Paul streets, she was found by two passers-by between ten and eleven o'clock in a semi-reclining position. Her face was bruised, her eyes blackened, her nose bleeding, and three of her teeth had been knocked out.

It is the contention of plaintiff that she came to contact with a broken wire, which was hanging near the sidewalk on the north side of Lafayette street and that the shock therefrom had thrown her to the ground, causing the injuries in question. On the other hand, defendant insists that plaintiff was assaulted and that her injuries resulted therefrom.

It is first insisted by counsel for plaintiff that the verdict is against the manifest weight of the evidence.

Plaintiff testified that she had her father went back to the station after the show, and deserted them * * * on west side of Columbus street and father went back to hotel's total. I walked up to the northeast corner of the park at Columbus and Lafayette streets, crossed to the north side of Lafayette at Appellate Court corner. There was a light just south of the Appellate Courthouse. There was no light on the west corner. Paul, Lafayette and Columbus streets are all paved with brick and have concrete curbing. I walked on the north side of Lafayette street; nobody was behind me, not that I see. Nobody about there at that time. While not exactly pitch-black, it was so dark that you could not see very well. * * * I was walking east on the north side of Lafayette street trying to myself. As I came to the corner I saw no light there, but I was not sleepy, and then I don't remember what happened. I came to myself; remember falling upon one knee and trying to get up. I don't remember anything more. The first time I remember after that was my brother trying to pick me up. He was talking to me; calling my name.

Plaintiff's mother testified that about eleven o'clock

that evening "my son John brought her home; he had his arms around her, her face was covered with blood, she was dazed, scarcely able to walk. She tried to talk, but I could scarcely understand. She kept saying, 'I am all right, mamma, I am all right,'"

John Brumbach, the brother, testified: "It was sprinkling while I was on my way home. When I came to Paul and Lafayette I saw an object there. I first heard a groan when I was fifty feet from the corner. At first I couldn't see anything, and when I got to the sidewalk which crosses Paul and Lafayette street I heard someone say, 'Mamma, where am I?' * * * Her feet were about on the curb and her head in kind of a southeast direction. She was lying flat on her back. She said nothing else. Carried her most of the way. She did not know anything and could not walk. * * * I called my father and the doctor. Father came. Doctor came right away. I went back to the corner where the injury occurred with the doctor. I found nothing there that night. We saw her teeth were out. Next morning dad and I went down to the corner and found her teeth and a small pin. Teeth were in a clot of blood. This clot was straight out from the north sidewalk on Lafayette right towards or between three or four feet east from the iron plate. It was straight east from the north end of the plate about four feet. I saw the wire hanging there the next morning right down over the corner, attached to the pole south of the walk. This pole was right at the northwest corner of Paul and Lafayette streets. * * * The end of the wire was about 100 feet from the pole. I went to the end of it. The insulation was in shreds. * * * Don't know whether it was charged or not. The blood clot was about eight or ten inches in diameter, with the teeth about in the center of it."

On cross examination, this witness testified: "I went to police station that night with Dr. Edgecomb between 11 and 11:15. Saw Desk Sergeant MacNamara. Saw him again the next day. * * * When I asked her (plaintiff) what happened, she said she did not know.

that evening "My son John [illegible] and found; he had his arms around her, her face was covered with blood, [illegible] seemed able to walk. She looked as if [illegible] I would [illegible] understand. She kept saying, 'I'm all right, [illegible] all right.'"

John Trumbo, the [illegible], testified: "It was [illegible] ing while I was on my way home. [illegible] to land and Lafayette I saw an object there. I [illegible] a crack when I was fifty feet from the corner. At first I couldn't see anything, and when I got to the sidewalk which crosses Earl and Lafayette street I heard someone say, 'Mamma, where is it?' * * * The feet were about on the curb and her head in line of a southeast direction. She was lying flat on her back. She said nothing else. Carried her most of the way. She did not know anything and could not walk. * * * I called my father and the doctor. Father came. Doctor came right away. I went back to the corner where the injury occurred with the doctor. I found nothing about that night. We saw her teeth were out. Next morning Earl and I went down to the corner and found her teeth and a small pin. There was a clot of blood. This clot was straight out from the north sidewalk on Lafayette right towards or between three or four feet east from the first plate. It was straight east from the north end of the plate about four feet. I saw the wire hanging there the next morning right down over the corner, attached to the pole south of the walk. This pole was right at the northwest corner of Earl and Lafayette streets. * * * The end of the wire was about 100 feet from the pole. I went to the end of it. The insulation was in shreds. * * * I don't know whether it was damaged or not. The blood clot was about eight or ten inches in diameter, with the teeth about in the center of it."

On cross examination, this witness testified: "I went to police station that night with [illegible]. Between 11 and 11:15. Saw Jack Sergeant Hollenbeck. [illegible] the next day. * * * When I asked her (plaintiff) about [illegible], she said she did not know

Gipson Finley testified: "Prior to that night (October 3, 1924) I observed where the wire rested on the pole it flashed a yellow light. Don't recall how often this was. Probably two or three times, but I don't know. Can't say how long before this injury. * * * I noticed the wires the day after Dorothy Brumbach was hurt. The wire was down about fifteen or twenty feet north of the walk when I first observed it; that is where it touched the ground and sloped up 45 degrees to the top of the pole, which I judge was thirty feet high. I called the service company the next morning."

Charles Fisher testified for the plaintiff: "I remember I saw one of the wires on the ground broken. It was along the curb, between the curb and the sidewalk. The wire was north of the walk running east and west. * * * The wire I saw was lying on the ground. It extended from the pole north."

Fred Buehler testified: "A person coming in contact or exposed to a live wire with large voltage sufficient to knock a person down, with a person standing on wet ground, there would be a burn if there were high voltage. If one came close to a current without direct contact, the injury would depend a great deal upon the voltage. A person can receive a shock sufficient to knock them down without getting a burn."

Plaintiff's father testified that he went to the place in question the following morning: "I saw a pool of blood there about three or four feet east of the iron crossing. The pole was an old pole. The pool of blood was about eight or ten inches in diameter. She must have struck her nose there. It was strung along the pavement about fifteen or eighteen inches. Four teeth were lying in the blood. I saw a wire down from a pole on the corner. It was lying down towards the street crossing from the plate at the corner. * * * It was a copper electric wire, with the insulation hanging on the wire in shreds. The wire was exposed."

William Graham testified that he went along the same street that night; that he "carried an umbrella. I was walking * * * on the outside of the walk as I turned east on the north

Ogden Finley testified: "Prior to that [illegible] (October 2, 1924) I observed where the wire rested on the pole it [illegible] a yellow light. Don't recall [illegible] any. Generally two or three times, but I don't know. [illegible] long before the injury. * * * I noticed the wires the last [illegible] was hurt. The wire was down about fifteen or twenty feet from of the walk when I first observed it; that is where it crosses the ground and slope [illegible] the top of the pole, [illegible] judge was thirty feet high. I noticed the morning before the morning."

Theodore Fisher testified for the plaintiff: "I remember I saw one of the wires on the morning before. It was along the curb, between the curb and the sidewalk. The wire was north of the walk running east and west. * * * The wire I saw was lying on the ground. It extended from the pole north."

Fred Weller testified: "I [illegible] or exposed to a live wire [illegible] a person down, with a [illegible] on the ground, there would be a burn if there were [illegible]. If one came close to current without direct contact, the current would [illegible] feel upon the victims. A person [illegible] sufficient to knock them down without [illegible] a burn."

Plaintiff's fourth witness testified [illegible] in question the following evidence: "I saw a piece of [illegible] about three or four feet east of the [illegible]. The pole was an old pole. The piece of wire was about eight or ten inches in diameter. He must have struck the [illegible]. It was strung along the sidewalk about fifteen or twenty inches. Four boys were lying in the blood. I saw a wire [illegible] from a pole on the corner. It was lying down [illegible] from the [illegible] plate at the corner. * * * It was a copper electric wire, with the insulation burning on the wire [illegible]. The wire was exposed."

Miller Fisher testified that he went along the [illegible] street that night; that he [illegible]. I was walking * * * on the outside of the walk on [illegible] east on the north

of Lafayette street. At the corner my umbrella caught some obstruction and I pushed the umbrella back. It was in my left hand. I put my hand up when I struck the umbrella. I experienced an electric shock. I was wearing rubbers. It was not a sever shock. Wore no gloves. My umbrella came in contact with a wire; I then presumed it was a telephone wire. The next morning I saw a wire, and it was on the berm coming down from the pole, slanted from the north. * * * I saw the wire hanging the next morning. I never saw it before."

The foregoing is the substance of the testimony on behalf of plaintiff as to how said injury occurred.

On behalf of defendant, Ernest Nink, a news reporter, testified that he saw plaintiff the day following her injury, and that she told him "she was walking east on Lafayette street near Paul and saw a man on the south side of the street; that she walked east of that intersection and the man crossed over to the north side and when she got near the high board fence, she was assaulted. I worte that story in the paper of October 4, 1924. Saw her thereafter at the Postal Telegraph office. Told me she was about to swear out warrants, but didn't name anyone. Saw her several times.* * * Miss Brumbach made no complaint to me about the articles written in the paper."

James Fox, captain of police testified that, following a report he found on the desk at the station on the morning of October 4, about 8:30 or nine O'clock, he went to plaintiff's place of business and talked to her; "she did not tell me who assaulted her. Talked about fifteen minutes with her. I went back to the station. Saw her again that day around six o'clock, at the police station. Her father and brother were with her. Officer MacNamara was also there. We talked about the case. She told me in the presence of MacNamara that she had been assaulted."

On cross examination, this witness testified: "She said, 'I was assaulted'. She said by a man. Could give no description of him at all. She said he came from behind and she didn't see

of Lafayette street. [illegible] obstruction and I [illegible] the [illegible]. [illegible] here. I put my hand up [illegible] an electric shock. I was [illegible] shock. [illegible] no gloves. [illegible] I then presumed it was [illegible]. [illegible] a wire, and it was [illegible] from the north. * * * I saw the [illegible] never saw it before."

The foregoing is the substance of the testimony on behalf of plaintiff as to how said injury occurred.

On behalf of defendant, [illegible], a duly [illegible], testified that he saw plaintiff [illegible] after injury, and that she told him [illegible] on Lafayette street that Iami and saw a man on the [illegible] side of the street; that he walked east of that intersection and the man crossed over to the north side and when she got near the [illegible] fence, she was electrocuted. I wrote that story in the report of [illegible]. [illegible] thereafter at the [illegible] office. [illegible] to answer out warrants, but didn't [illegible]. [illegible] several times." * * [illegible] the article written in the report."

James Fox, [illegible] of [illegible], following a report he found on the desk at the station on the morning of October 4, about 8:30 or [illegible], [illegible] plaintiff's place of business and talked to her; [illegible] electrocuted her. Talked about fifteen minutes with her. I went back to the station. Her mother again that her [illegible] at the police station. Her father and brother were with her. [illegible] was also there. He talked about the [illegible]. [illegible] told me in the presence of McNamara that she had been [illegible]."

On cross examination, this witness testified: "She said, 'I was electrocuted'. She said by a [illegible]. Would give no description of him at all. "He said he [illegible] behind and she didn't see

him at all. Said she had seen him on the opposite side of the street. * * * She said she had been assaulted, but did not know what happened to her when the blow was struck."

Frank MacNamara, desk sergeant, testified: "I was on duty the next evening, October 4. Officer Fox came along about six o'clock that following night. Dorothy Brumbach came there that evening with her father and brother. She told us there that she had been assaulted."

Harry Mitchell, salesman for the defendant, testified that he was demonstrating washing machines for a Mrs. Hammereich on October 8, 1924; that a Mrs. Langley and plaintiff and her mother were there at the time. "Mother and daughter (Mrs. Brumbach and plaintiff) talked there relative to the occurrence of a few nights before. Her (plaintiff's face was bruised. She told me in a general way how the thing happened. * * * She said she had been assaulted. Said she knew the difference between an assault and coming in contact with a live wire."

Mrs. Langley testified that she was at Mrs. Hammereich's when plaintiff, her mother, and Mr. Mitchell were there; "We were in the kitchen. I heard her (plaintiff) tell that she knew that somebody hit her or something like that, but I cannot tell you the same words. She said she could tell the difference between being struck and coming in contact with a live wire."

Edna Lewis testified that she worked at the Postal Telegraph in the cage next to plaintiff, and stated: "I saw her the next morning; asked what had happened to her. It was about eight o'clock. Told me she had been slugged. That it happened along the high board fence, near the academy. Think it was the same day she told me that."

There was further testimony on behalf of the defendant with reference to things said and done by plaintiff's family, indicating that they were of the opinion that plaintiff had been assaulted, but it is not necessary to go into this testimony in detail. Plaintiff, in rebuttal, specifically denied having stated

him at all. Said she had seen him on the opposite side of the street. * * * She said she had been assaulted, but did not know what happened to her when the alley was crossed."

Frank Bollemeyer, deaf witness, testified: "I was on duty the next evening, October 6. Between ten and eleven second six o'clock that following night. Thought remembered that there that evening with her father and brother. She told it there that she had been assaulted."

Henry Hrobeil, policeman for the defendant, testified that he was demonstrating [illegible] on October 8, 1924; that a Mr. [illegible] and plaintiff's mother were there at the time. [illegible] and plaintiff) talked there relative to the occurrence of a few nights before. Her (plaintiff's) face was bruised. She told in a general way how the thing happened. * * * She said she had been assaulted. Said she saw the difference between an assault and coming in contact with a live wire.

Mrs. Langley testified that she was at the [illegible] when plaintiff, her father, and [illegible] were there; "We were in the kitchen. I heard her (plaintiff) tell [illegible] know that somebody hit her or something like that, but I [illegible] tell you the same words. She said she could tell the difference between being struck and coming in contact with a live wire."

Mrs. Davis testified that she worked [illegible] the photographer in the cage next to plaintiff, and testified: "I saw her the next morning; asked what had happened to her. It was about eight o'clock. Told me she had been slugged. [illegible] reported along the high board fence, near the [illegible]. [illegible] was the same day she told me that."

There was further testimony on behalf of the defendant with reference to things said [illegible] by plaintiff's family, indicating that they were of the opinion that plaintiff had been assaulted, but it is not necessary [illegible] this testimony in detail. Plaintiff, in rebuttal, [illegible] testified

to any of the above mentioned witnesses for defendant that she had been assaulted.

The foregoing is in substance the testimony with reference to how said injury occurred. The verdict of the jury is not against the manifest weight of the evidence.

It is next insisted that the court erred in modifying plaintiff's second given instruction, and in giving defendant's sixth, eighth, ninth, tenth, thirteenth, fourteenth, fifteenth and sixteenth instructions.

The modification complained of required the jury to find that defendant negligently allowed the wire in question "to be and remain improperly insulated, and with the insulation thereon to be worn, loose and ragged, and also permitted said wire to be and remain old and of insufficient strength to withstand the ordinary strain," etc.

It is insisted that, under the doctrine of res ipsa loquitur, the burden was not on plaintiff to affirmatively prove negligence on the part of defendant, but that the happening of the injury to the plaintiff, under the circumstances disclosed by the evidence, was sufficient for the jury to assume negligence on the part of the defendant, without further proof.

This same point is urged in connection with the giving of defendant's sixth and sixteenth instructions; said instructions being as follows:

"The Court instructs the jury that the burden of proof is not upon the defendant to show that it is not guilty of the specific negligence charged in the declaration or in some count thereof, but the burden is upon the plaintiff to prove that the defendant was guilty of such negligence, and this rule, as to the burden of proof, is binding in law and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in weighing the evidence and coming to a verdict the jury should apply said rule and adhere strictly to it. No presumption that the defendant was negligent arises from the mere fact that the accident happened."

to any of the above mentioned witnesses for instructions that she had been assaulted.

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This same point is urged in connection with the giving of defendant's sixth and sixteenth instructions; said instructions being as follows:

"The Court instructs the jury that the burden of proof is not upon the defendant to show that it is not guilty of the specific negligence charged in the declaration or in same count thereof, but the burden is upon the plaintiff to prove that the defendant was guilty of such negligence, and this rule, as to the burden of proof, is applicable in law and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in weighing the evidence and coming to a verdict the jury must apply said rule and adhere strictly to it. No presumption that the defendant was negligent arises from the mere fact that the accident happened."

"The Court instructs you that if you believe from all the facts and circumstances in evidence you are not able to say how the accident happened, it would be your duty to find the defendant not guilty."

Counsel for plaintiff cite as supporting their contention Feldman v. Chicago Ry Co., 269 Ill. 25; Chicago Union Traction Co. v. Giese, 229 Ill. 260; Fielf v. Winheim, 123 App. 227; Heimberger v. Elliott, 165 App. 316.

In Feldman v. Chicago Railway Co., the court at page 34 says:

"The doctrine of res ipsa loquitur may be stated thus: When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the want of proper care." Citing Chicago Union Traction Co. v. Giese, 229 Ill. 260.

Quoting further from this case, the court at page 35 says:

"The record contains no evidence explaining the cause of the accident or overcoming the presumption of negligence. We are of the opinion, therefore, that the plaintiff in error was at the time of the injury a passenger, to whom defendants in error owed the highest degree of care, and that under the first and second counts of the declaration and the circumstances in this case a prima facie case of negligence was made out under the doctrine of res ipsa loquitur.

In Chicago Union Traction Co. v. Giese, the court at page 264 says:

"In the case before us, all of the elements of the accident were within the complete control of appellant, and the result is so far out of the usual course of things that there is no fair inference that it could have been produced by any other cause than negligence."

"The Court instructs you that if you believe from all the facts and circumstances in evidence [illegible] the accident happened, it would be your duty to find the defendant not guilty."

Counsel for plaintiff [illegible] Fishman v. Chicago Ry Co., 224 Ill. [illegible]; [illegible] v. Giese, 229 Ill. 250; [illegible] v. Elliott, 160 Ill. 312.

In Fishman v. Chicago Railway Co., [illegible] the court says:

"The doctrine of res ipsa loquitur [illegible] from a thing which was caused an injury is proof to charge the management of the party charged with negligence, and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the evidence itself affords reasonable evidence, in the absence of an explanation by the parties charged, that it arose from the lack of proper care." Citing Chicago Union Traction Co. v. [illegible], 207 Ill. 489.

Quoting further from this case, the court says:

"The rule concerns no evidence as to the cause of the accident or overcoming the prima facie of negligence. It is of the opinion, therefore, that the plaintiff in error was at the time of the injury a passenger, in good relationship to the car and the highest degree of care, and that there was no proof of the isolation and the circumstances [illegible] prima facie case of negligence [illegible] the doctrine of res ipsa loquitur."

In Chicago Union Traction Co. v. [illegible], the court at page 204 says:

"In the case before us, [illegible] the elements of the accident were within the complete control of the defendant, and the result is so far out of the usual course of things that there is no fair inference that it would have happened in any other manner than negligence."

Heimberger v. Elliott, supra, is not applicable here, as the Court there held that the injured party, who was in the employ of the Elliott Frog & Switch Company, could not recover on the doctrine of res ipsa loquitur, even though the instrumentality which caused the injury was in possession of the company, its control and operation being in the injured party. In Fielf v. Winheim, supra, suit was brought to recover for an injury caused by the falling of a passenger elevator, which was entirely in the possession and control of the party sued.

In order for plaintiff to successfully invoke the doctrine of res ipsa loquitur, it must be assumed that her injury was caused by coming in contact with the wire in question. That fact was directly in issue, and the finding of the jury thereon is not against the manifest weight of the evidence. In none of the cases cited was there any question but that the injury for which recovery was sought was caused by means of instrumentalities in the possession of the party sued. The court did not err in modifying plaintiff's second instruction and in giving defendant's sixth and sixteenth instructions. It might be further observed that plaintiff's first given instruction adopts the theory that the burden of proving negligence is on the plaintiff.

The doctrine of res ipsa loquitur does not relieve a plaintiff from the burden of proof, but is a rule of evidence. In Feldman v. Chicago Railway Co., supra, the court at page 35 says:

"The rule is that negligence is never presumed, but that the circumstances surrounding the case where the maxim of res ipsa loquitur applies, amount to evidence from which the facts of negligence may be found; that is, in a case within the maxim of res ipsa loquitur, proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault."

Defendant's eighth, ninth, and tenth instructions state a correct principle of law, and the court did not err in giving the same.

Heimbeyer v. Hilton, supra, [illegible] the Court there held that the injured party, [illegible] in the employ of the Hilton Tree [illegible] Company, was not entitled on the doctrine of res ipsa loquitur, even though the [illegible] operation caused the injury was in possession of the company, its owner and operation being in the injured party. [illegible] v. [illegible], supra, suit was brought to recover [illegible] injury [illegible] the failure of a passenger elevator, which was [illegible] in the possession and control of the party sued.

In order for plaintiff to successfully invoke the doctrine of res ipsa loquitur, it must be [illegible] injury was caused by coming in contact with the [illegible]. The fact was directly in issue, and the [illegible] in not against the greatest weight of the evidence. In none of the cases cited was there any question but that the [illegible] recovery was sought was caused by reason of negligence in the possession of the party sued. The [illegible] in such cases is satisfied second instruction and in [illegible] instructions [illegible] instructions. It might be [illegible] given instruction admits the [illegible] negligence in on the plaintiff.

The doctrine of res ipsa loquitur does not relieve a plaintiff from the burden of proof, but is a rule of evidence. In Feldman v. Chicago Railway Co., supra, [illegible] 55 [illegible]

"The rule is that [illegible] proof, but that the circumstances surrounding the case [illegible] of res ipsa loquitur applies, [illegible] from which the trier of negligence may be found. [illegible] within the maxim of res ipsa loquitur, [illegible] of the circumstances of each case and of the injury constitutes a [illegible] of negligence, and will justify a verdict [illegible] presumption is overcome by proof showing that the party [illegible] fault."

Delehunt's [illegible] instructions state a correct principle of law, [illegible] in giving the [illegible]

[illegible].

It is insisted that the giving of defendant's thirteenth instruction is erroneous, for the reason that it would warrant the jury in finding that a witness' testimony should be impeached because contrary to previous statements made out of court. While the instruction is not as carefully guarded as it should be, what the jury are finally told is that they may take these contradictory statements into consideration in weighing the testimony. There was no serious error in the giving of this instruction.

It is contended that defendants fourteenth and fifteenth instructions require a higher degree of proof than the law requires. While the use of the word "establish" is not happy, an examination of the instructions will disclose that all the plaintiff was required to do was to prove her case by a preponderance of the evidence. No serious error resulted from the giving of these instructions.

The contention of plaintiff for a reversal of the judgment in this case is founded on the proposition that the doctrine of res ipsa loquitur should have been held to apply, and that the court erred in not so holding. Clearly, under the authorities cited, that doctrine does not apply in this case, or in any case where it is not conceded or clearly proven that the injury for which recovery is sought was caused by instrumentality in the possession and control of the party sued. That proof was not made in this case.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

It is insisted that the giving of [illegible] instruction is erroneous, for the reason that [illegible] jury in finding that a witness' testimony should be [illegible] because contrary to practices [illegible] out of court. While the instruction is not as [illegible] the jury are finally told to [illegible] satisfactory evidence into consideration in [illegible] the testimony. There was no serious error in the giving of this instruction.

It is contended that the [illegible] fifteenth instructions require a [illegible] the law relative. While the use of the word [illegible] in the second, the construction of the instructions will [illegible] quired the jury to see to prove [illegible] the evidence. No serious error resulted from the giving of these instructions.

The contention of [illegible] of the judgment in this case is founded on the proposition that the testimony of [illegible] was [illegible] erred in not so holding. Clearly, [illegible] doctrine does not apply in this case, [illegible] not a needed or else in [illegible] for which recovery is sought was caused by [illegible] of the party sued. [illegible] in this case.

For the reasons [illegible], the judgment of the trial court will be affirmed.

[illegible].

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

SAM WEISMAN, APPELLANT,	:	
	:	
v.	:	APPEAL FROM THE CIRCUIT COURT OF ROCK ISLAND COUNTY.
	:	
CHARLES BRADY, FRED H. RAILSBACK, TRUSTEE IN BANKRUPTCY OF CHARLES BRADY, AND OTTO HILL, APPELLEES	:	

JONES P.J.

Sam Weisman, complainant, filed a bill to foreclose a mechanic's lien against certain premises owned by Charles Brady, defendant. The bill was filed December 24, 1925, and alleged that Brady was the owner of the premises in question, and employed complainant to repair a brick warehouse thereon which had been partially destroyed by fire; that the contract price for doing the same was $5300; that before the work was begun, complainant also contracted with Brady to repair a concrete building on said premises which had been damaged by the same fire, and to change the driveway in said brick warehouse, which defendant had been using in his junk business and in part as a garage; that under the latter contract, complainant was to be paid on the basis of cost plus ten per cent. The allegations of the bill as framed showed that all the work was to be done as a unit. It alleged that the work was to be paid for upon completion and was completely performed by appellant, and accepted by Brady on or before May 20, 1925.

On April 7, 1926, complainant filed an amended and supplemental bill making Otto Hill, mortgagee, a party defendant. This bill alleged that on or about February 14, 1925, complainant entered into a contract, not in writing, with Brady, to reconstruct and repair a brick warehouse for the agreed sum of $5300, due and payable when the contract was completed; that before the contract to reconstruct such warehouse was completed, Brady applied to complainant to do extra and additional

SAM WEISMAN, APPELLANT,

v.

CHARLES BRADY, FRED T. WILLEMSEN, TRUSTEES IN BANKRUPTCY OF CHARLES BRADY, AND OTTO HILL, APPELLEES.

JONES J.L.

Sam Weisman, complainant, filed a bill to foreclose a mechanic's lien against certain premises owned by Charles Brady, defendant. The bill was filed December 5, 1928, and alleged that Brady was the owner of the premises in question, and employed complainant to repair a brick warehouse thereon which had been partially destroyed by fire; that the contract price for doing the same was $5300; that before the work was begun, defendant also contracted with Brady to repair a concrete building on said premises which had been damaged by the same fire, and to remove the driveway in said brick warehouse, which driveway had been used in his junk business and is part of a property; that under the latter contract, complainant was to be paid at the rate of cost plus ten per cent. The allegations of the bill as framed showed that all the work was to be done as a unit. It alleged that the work was to be paid for upon completion and was completely performed by complainant, and accepted by Brady on or before May 30, 1929.

On April 7, 1929, complainant filed an amended and supplemental bill making Otto Hill, mortgagee, a party defendant. This bill alleged that on or about February 15, 1929, complainant entered into a contract, not in writing, with Brady, to reconstruct and repair a brick warehouse for the price and sum of $5300, due and payable when the contract was completed; that before the contract to reconstruct such warehouse was completed, Brady applied to complainant to do extra and additional

work on the premises by repairing a concrete block building thereon, and to change a certain driveway in the brick warehouse building, construct a certain garage on the premises, and make other changes; that thereupon Brady and complainant entered into an oral contract, whereby complainant was to furnish all material and labor necessary for such additional work; and that Brady agreed to pay him the cost thereof plus 10% upon the completion of the work. Said amended and supplemental bill further alleged that complainant furnished some extra work and material and completed that work on December 15, 1925, also some further work on February 8, 1926, and that said contract was fully completed on February 8, 1926. Later on January 5th, 1928, complainant filed supplemental allegations to the effect that on June 10, 1927, after the filing of his original bill, he recovered a judgment for $5307.70 in a suit at law against Brady, which amount included the indebtedness for which a lien is claimed in this case.

A separate demurrer was interposed by Hill, and a joint demurrer by Brady and his trustee in bankruptcy. The ground for these demurrers was that the bill alleged the work was completed on February 8, 1926, which was subsequent to the filing of the suit. The court properly sustained the demurrers. Thereafter complainant filed an amendment to said amended and supplemental bill, alleging that the contract was fully completed on December 15, 1925. Demurrers were sustained to the amended and supplemental bill as so amended. Complainant elected to stand by his bill and the same was dismissed. This cause is brought to this court to review the decree dismissing the bill.

Section 7 of the Lien Act, Chapter 82, Revised Statute, provides that no contractor shall be allowed to enforce his lien against or to the prejudice of any other creditor, incumbrancer, or purchaser, unless within four months after completion or within four months after the completion of any extra or additional work or the delivery of any extra or additional material, he shall either bring suit to enforce his lien

work on the premises by repairing a concrete block building, tower-on, and to change a certain driveway in the building, construct a certain garage on the premises, and make other changes; that thereupon Brady and complainant entered into an oral contract, whereby complainant was to furnish all materials and labor necessary for such additional work; and that Brady agreed to pay him the cost thereof plus 10% upon the completion of the work. Said amended and supplemental bill further alleged that complainant furnished some extra work and materials and completed that work on December 15, 1926, also some further work on February 8, 1926, and that said contractor was fully completed on February 8, 1926. Prior to January 8th, 1926, complainant filed supplemental allegations to the effect that on June 10, 1927, after the filing of his original bill, he recovered a judgment for $3207.70 in a suit at law against Brady, which amount included the indebtedness for which a lien is claimed in this case.

A separate demurrer was interposed by Hill, and a joint demurrer by Brady and his trustee in bankruptcy. The ground for these demurrers was that the bill alleged the work was completed on February 8, 1926, which was subsequent to the filing of the suit. The court properly sustained the demurrers. Thereafter complainant filed an amendment to said amended and supplemental bill, alleging that the contract was fully completed on December 15, 1926. Demurrers were sustained to the amended and supplemental bill as so amended. Complainant elected to stand by his bill and the same was dismissed. This cause is brought to this court to review the decree dismissing the bill.

Section 7 of the Lien Act, Chapter 22, Revised Statutes, provides that no contractor shall be allowed to enforce his lien against or to the prejudice of any other creditor, incumbrancer, or purchaser, unless within four months after completion or within four months after the completion of any extra or additional work or the delivery of any extra or additional material, he shall either bring suit to enforce his lien

therefor, or shall file with the clerk of the circuit court a claim for lien, etc. As to the owner of the premises, such suit must be begun within two years after completion or the completion of extra or additional work, or the furnishing of extra or additional material.

Under the allegation of the original bill, that the work was completed on May 20, 1925, no decree could have been entered against Hill, because he was not made a party to the suit until April 7, 1926, or more than four months after the work was alleged to have been completed. The amended and supplemental bill of April 7, 1926, was filed to obviate that difficulty by fixing the date of final completion on February 8, 1926. But that date is subsequent to the institution of the suit, and made the bill subject to demurrer on that account. In order to cure that defect, the amendment of March 15, 1928 was made, fixing the date of the final completion of the work on December 15, 1925, which date is prior to the filing of the original bill and is within four months of the time when Hill was made a party to the suit.

Appellees urge that the provision of the statute requiring the bill to state the time of completion of the work is mandatory; that inasmuch as the date named in the last amendment is different from the date set out in the original bill, such amendment amounts to the statement of a new cause of action; and that having been filed more than two years after the alleged completion of the work as therein stated, was subject to demurrer by reason of the Statute of Limitations.

The argument is, that the last amendment, made March 15, 1928, stated a new cause of action against Brady, and was the first statement of any cause of action against Hill, and that because it was filed more than two years after the completion of the work on December 15, 1925, (the date of completion of the work as fixed in the last amendment), the demurrers were properly sustained. In support of their contention, appellees

therefor, or shall file with the clerk of the circuit court a claim for lien, etc. As to the owner or the materials, such suit must be begun within two years after completion or the completion of extra or additional work, or the furnishing of extra or additional material.

Under an allegation of the original bill, that the work was completed on July 20, 1922, no lien could have been entered against Hill, because he was not made a party to the suit until April 7, 1926, or more than four years after the work was alleged to have been completed. The amended and supplemental bill of April 7, 1926, was filed by complainant that difficulty by fixing the date of final completion on February 6, 1926. But that date is subsequent to the institution of the suit, and made the bill subject to demurrer on that account. In order to cure that defect, the amendment of June 17, 1928 was made, fixing the date of the final completion of the work on December 15, 1922, which date is prior to the filing of the original bill and is within four months of the time when Hill was made a party to the suit.

Appellees urge that the provision of the statute requiring the bill to state the time of completion of the work is mandatory; that inasmuch as the date named in the last amendment is different from the date set out in the original bill, such amendment amounts to the substitution of a new cause of action; and that having been filed more than two years after the alleged completion of the work, it was barred, and was subject to demurrer by reason of the statute of limitations.

The argument is, that the last amendment, which was June 15, 1928, stated a new cause of action against Hill, and was the first statement of any cause of action against Hill, and that because it was filed more than two years after the completion of the work on December 15, 1922, (the date of completion of the work as fixed in the last amendment), the statutes were properly sustained. In support of their contention, appellees

rely on North Side Sash & Door Company v. Hecht, 295 Ill. 515. In that case the original bill made a purchaser of the premises a party defendant, and fixed the date of completion at a time more than four months previous to the filing of the bill. It therefore did not state a cause of action against him. An amendment to the bill was filed, fixing the date of completion within four months previous to the filing of the original bill, but the amendment itself was filed more than four months after the date of completion as therein alleged. It was held that a lien was not shown to have been established under the statute. The statutory requirement is that the bill must state when the work was completed, but this does not mean that the complainant may not amend his bill and change the date stated therein when the bill, before amendment, states a cause of action. This reasoning applies to the last amendment as well as the first. The original bill in the case at bar did state a cause of action against Brady, the sole defendant therein, and alleged the work was completed on May 20, 1925. Hill, the mortgagee, was not a party to that bill. Therefore, the ruling in the Hecht case is not applicable to the facts in the case at bar. Complainant, even before he made Hill a party defendant, could have amended his original bill by changing the date of completion from May 20, 1925, to December 15, 1925. The amendment would not have given Brady any cause to complain. Further, if after such amendment had been made, and on to-wit, April 7, 1926, complainant had obtained leave to amend his bill by making Hill a party, he could have done so. When such amendments had been made, the pleadings would have been in the precise condition in which they now are.

The statute does not require that creditors, incumbrances, or purchasers be made parties to the original bill. The only effect of omitting to make them parties is that their rights are not affected by the proceedings.

rely on North Side Bank v. Door County, 200 Wis. 175.
In that case the original bill made a mortgagee of the premises a party defendant, and fixed the date of completion at a time more than four months previous to the filing of the bill. It therefore did not state a cause of action against him. The amendment to the bill was filed, fixing the date of completion within four months previous to the filing of the original bill, but the amendment itself was filed more than four months after the date of completion as therein alleged. It was held that a lien was not shown to have been established under the statute. The statutory requirement is that the bill must state when the work was completed, but this does not mean that the complainant may not amend his bill and change the date stated therein when the bill, before amendment, states a cause of action. This reasoning applies to the last amendment as well as the first.

The original bill in the case at bar did state a cause of action against Hill, the sole defendant therein, and alleged the work was completed on May 20, 1925. Hill, the mortgagee, was not a party to that bill. Therefore, the ruling in the North case is not applicable to the facts in the case at bar. Complainant, even before he made Hill a party defendant, could have amended his original bill by changing the date of completion from May 20, 1925, to December 15, 1925. The amendment would not have given Hardy any cause to complain. Further, if after such amendment had been made, and on to-wit, April 7, 1926, complainant had obtained leave to amend his bill by making Hill a party, he could have done so. Then such amendments had been made, the pleadings would have been in the precise condition in which they now are.

The statute does not require that creditors, incumbrancers, or purchasers be made parties to the original bill. The only effect of omitting to make them parties is that their rights are not affected by the proceedings.

In the Hecht case, complainant saw fit to make the purchaser a party defendant to his original bill, and it was therefore necessary to allege therein facts showing a cause of action against him.

It is insisted that the amendment to the amended and supplemental bill stated a new and distinct cause of action against the owner, and being filled more that two years after completion, the court was right in sustaining the demurrers. The Hecht case is also cited as authority for this contention. The distinguishing features of that case have already been pointed out and need not be further discussed here. However, it is enough to say that the work to be done as alleged in the original bill appears to be the same as that set forth by the amendment. The property is the same; the price and terms are the same; the relief sought is the same; and as to Brady, the cause of action is identical.

Defendant Hill urges that the bill, as amended, does not allege that the additional work was performed as a part of the original contract. The allegation is that Brady "complained that your orator had not completely finished said contract and demanded of your orator, that he do certain painting, etc. * * * And in response to said demand, your orator did do such painting, etc.", and it is further alleged that the contract was fully completed on December 15, 1925. We think it sufficiently alleges that the additional work was performed as a part of the original contract.

Acceptance of the work by the owner is not a prerequisite to the commencement of a suit to enforce a lien. The statute nowhere makes such a requirement. If that were the law, any owner could defeat a lien by simply refusing to accept the work. Neither is it provided that a contractor must comply with the provisions of Section 5 of the Lien Act before beginning action to enforce his lien. (Hall v. Harris,

in the Scott case, complainant sought to sue [illegible] property defendant to his original bill, [illegible] it was necessary to allege [illegible] against him.

It is insisted that an amendment to an original and supplemental bill stated a new and different cause of action against the owner, and [illegible] complete, the court was right in [illegible] demurrer. The Scott case is also cited as [illegible] The distinguishing features of that case have already been pointed out and need not be [illegible] However, it is enough to say that the work to be [illegible] original bill appears to be the same as that set forth in the amendment. The property is the same; the [illegible] are the same; the relief sought is the same; and so [illegible] the cause of action is identical.

Defendant Will cases [illegible] does not allege that the additional work [illegible] a part of the original contract. [illegible] "complained that your [illegible] said contract and demanded of [illegible] painting, etc. [illegible] and in [illegible] your order did do such painting, etc." [illegible] that the contract was fully [illegible] in 1926. We think it sufficiently appears that [illegible] formed as a part of the original contract.

Inasmuch as the work if [illegible] is not a [illegible] requisite to the commencement of a suit to enforce a lien. The statute modifies such a requirement. If that were the law, any owner could defeat a lien [illegible] to assert the work. Neither is it [illegible] that a contractor must comply with the provisions of section 2 of the lien act before beginning action to enforce a lien. (Hall v. Hall,

242 Ill. App. 315; Fleming v. Galloway, 212 id. 226.) Nor is the recovery of a judgment in an action at law on account of the work a bar to this proceeding. The remedies are cumulative. (Decatur Bridge Co. v. Standart, 208 Ill. App. 592; M. Pugh Co. v. Wallace, 198 Ill. 422, Erikson v. Ward 266 id. 259.)

Defendants insist that the bill as amended is so loosely drawn that it fails to state a cause of action and is demurrable on that ground alone. It may not be a model of pleading, but we think it is sufficiently definite and certain for its purpose.

For the error in sustaining the demurrers to the amended and supplemental bill as amended, the decree is reversed and the cause remanded, with directions to overrule the demurrers.

Reversed and remanded with directions.

248 Ill. App. 313; Fleming v. Dailey, [illegible]. [illegible] the recovery of a judgment in [illegible] work a bar to their prosecution. [illegible]
(Decatur Bridge Co. v. Stephens, 104 Ill. [illegible]; [illegible] Co. v. Kallage, 188 Ill. [illegible], [illegible] v. [illegible]).

Defendants insist that the trial court [illegible] loosely drawn that it fails to state a [illegible] damnatory on that ground alone. [illegible] pleading, but we think it is sufficiently [illegible] for its purpose.

For the error in sustaining the demurrer to [illegible] amended and supplemental bill of complaint, the [illegible] reversed and the cause remanded, with directions [illegible] demurrers.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 11 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7929 Agenda 6.

ARTHUR F. FILKINS, APPELLANT.	:	
	:	APPEAL FROM THE CIRCUIT COURT OF PEORIA COUNTY.
v.	:	
LOUIS MUELLER, MAYOR OF THE CITY OF PEORIA, ET AL, APPELLEES	:	

JETT. J.

Arthur F. Filkins, filed a petition for a writ of mandamus in the circuit court of Peoria county, against Louis Mueller, Mayor of the City of Peoria, A. W. McMasters, Comptroller of the City of Peoria, William Kunst, Superintendent of Police of the City of Peoria, Charles Caswell, Charles Engler and Gus Karl, Police and Fire Commissioners of the City of Peoria, and Fred Buerke, to compel his re-instatement to the office of Patrolman, and for payment of his salary from the time of his removal to the time of his reinstatement. A demurrer to the petition was filed by the respondents, appellees here, which was over ruled, and an answer was filed thereto, denying the allegations in said petition.

The Petition was amended by making the City of Peoria and the treasurer of said city, parties defendant. A demurrer to the petition as amended, was filed but withdrawn, and an answer was filed, denying the allegations of the petitioner. To the answer a replication was filed and the cause was tried before the court and a jury.

At the conclusion of the evidence the court directed the jury to return a verdict against the petitioner on the question of salary, and to find in his favor on his petition for reinstatement.

General Number 7220

ARTHUR T. WILKINS, APPELLANT.	:
v.	:
LOUIS WEHLER, MAYOR OF THE CITY OF PEORIA, ET AL., APPELLEES	:

JETT. J.

Arthur T. Wilkins, filed a petition for a writ of mandamus in the circuit court of Peoria county, against Louis Wehler, Mayor of the City of Peoria, L. T. Lewellyn, Comptroller of the City of Peoria, William Ewert, Superintendent of Police of the City of Peoria, Martin Dowell, Charles Engler and Ora Ort, Police and Fire Commissioners of the City of Peoria, and Paul Harris, to compel his re-instatement to the office of Patrolman, and for damages, by the plaintiff, for the time of his removal to the time of his reinstatement. A demurrer to the petition was filed by the defendants, appellees here, which was overruled, and an answer was filed thereto, denying the allegations in said petition.

The petition was dismissed by order of the City of Peoria and the treasurer of said City, parties interested. A demurrer to the petition as amended, was filed by defendant, and an answer was filed, denying the allegations of the petitioner. On the answer, trial was had, and the cause was tried before the court and a jury.

At the conclusion of the evidence the court directed the jury to return a verdict finding the issues on the merits for appellee, and on filing the plaintiff's petition for rehearing,

Judgment was rendered on the verdict returned by the jury. Appellant and Appellees prayed for and perfected an appeal to this court, and by stipulation of the parties, ~~and~~ the record and abstract of record, of the petitioner filed herein, are considered as the record and abstract of record, of appellant and appellees, without prejudice to either party.

While the facts in this case differ slightly from the facts in Number 7927, the principles involved are the same, and for the reasons stated in the opinion in Number 7927, the judgment in this cause is reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. FRANKLIN H. BOGGS, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7896 Agenda 7.

CHARLES H. DAVIS
appellee,
vs.
WILLIAM TERMAN, et al
appellants.

WILLIAM P. BECKERS,
appellee,
vs.
WILLIAM TERMAN, et al
appellants

APPEAL FROM THE
CIRCUIT COURT OF KANKAKEE
COUNTY.

Jett, J.

The Farmers Merchants Produce Company was a partnership formed in October 1921. Charles H. Davis, one of the appellees, and William Terman constituted the partnership for the purpose of buying, dressing and selling poultry. Meyer Terman claimed to have been a partner.

Under the agreement of Davis and William Terman each was to furnish One Thousand Dollars capital and the profits and losses were to be divided accordingly. Davis was to receive $40.00 per week for keeping books and running the office. William Terman was to receive $40.00 per week and do the buying. Meyer Terman was to be paid 75¢ per hundred weight for hauling and delivering the chickens. This seems, from the record, to have been the agreement entered into by Davis and William Terman with Meyer Terman. The business was transacted at Kankakee, Illinois, where the chickens were delivered and dressed; they were then hauled to Chicago and placed in the plant of the North American Cold Storage Company in the name of Edward Terman Company, a commission broker, composed of Edward Terman only. Edward Terman and William Terman, a member of the firm, are brothers. Meyer Terman is a son of William Terman.

Vol. 2.

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CHARLES H. DAVIS

:

Appellee,

:

vs.

:

WILLIAM TORREY, et al

:

Appellants.

:

:

WILLIAM T. TORREY,

:

Appellee,

:

vs.

:

WILLIAM TORREY, et al

:

Appellants.

:

Lott, J.

The Charles H. Davis Company, a corporation, was a partnership formed in Boston, Massachusetts, consisting of the appellee, and William Torrey, hereinafter called the appellant, for the purpose of buying, selling and selling [illegible]. Under Torrey obtained an interest in the firm.

Prior to the formation of this partnership the Davis Company had leased a building in Boston, Massachusetts, and located at [illegible] Street, in the City of Boston, for a term of years at a rental of $[illegible] per month. The Torrey obtained an interest in the firm, the Davis Company, in [illegible] defendants [illegible] Company, [illegible] the Company, [illegible] been. The partnership entered into an [illegible] with Weyer Factory. The building was [illegible] Company, [illegible], where the [illegible] were [illegible] and [illegible]; [illegible] were [illegible] manned by [illegible] and [illegible] in the [illegible] of the [illegible] [illegible] Cold Storage Company in [illegible] at [illegible] [illegible] [illegible] commission [illegible], [illegible] [illegible] [illegible] and William Torrey, [illegible] of the firm, are [illegible]. [illegible] Torrey is a [illegible] William [illegible].

The banking business of the Farmers Merchants Produce Company was carried on at the State Bank of Papineau. Upon the sale of poultry by Edward Terman, the commission broker, remittance was to be made to the produce company and the check deposited in the state bank of Papineau.

Sometime after the business had started the Farmers Merchants Produce Company bought two carloads of chickens and did not have the money with which to pay for them. Application was made to one William P. Beckers to advance the money. Beckers consented to do so upon the terms for which he was to be paid out of the proceeds of the sale of the chickens and also share in the profits made upon such poultry. A like situation again occurred within a short time in which Beckers advanced $2500.00 as he had done on the former occasion. A little later Beckers again advanced $2,000.00 under a similar agreement. He was re-paid the latter sum of $2,000.00 advanced but no part of the $5,000. was paid to him.

Efforts were made to induce Beckers and the cashier of the Papineau bank to become partners. The efforts failed although it is insisted by appellants that Beckers became a partner in the business.

The record shows that the Produce Company was not financially solvent. Trouble arose between the various persons interested in it and finally it ceased to do business. At the time the Produce Company quit business Edward Terman had in his name at the North American Cold Storage Company's plant a quantity of chickens and it was agreed in writing by members of the produce company and Beckers that this poultry should not be disposed of without notice to and the consent of Davis or Beckers, it evidently being the intention of the parties to give Beckers an opportunity to receive the profits of the sale of the chickens upon the indebtedness due to him.

Matters ran along for sometime and the poultry was

sole by Edward Terman and no disposition was made of the fund. About four months later, at the request of Meyer Terman, Edward Terman gave him a check for $1557.67 the balance due and payable to the produce company. Meyer Terman endorsed the check in the name of the produce company, cashed it and made no return to the produce company. Owing to the condition of affairs as existed, shortly after Edward Terman had delivered the check in question to Meyer Terman, Charles H. Davis, a member of the partnership, filed his bill in the Circuit Court of Kankakee County for an accounting and for a dissolution of the partnership.

Davis in his bill for an accounting and for a dissolution of the partnership made William Terman, Meyer Terman, William P. Beckers, Edward Terman, Edward Terman Commission Company, a corporation, Edward Terman doing business under the firm name ef and style of Edward Terman Company, the North American Cold Storage Company, a corporation, the Continental and Commercial National bank of Chicago, a banking corporation and the bank of Papineau, defendants. The defendants answered the original bill filed by Davis. William P. Beckers in addition to answering the bill filed a cross bill charging among other things that he was entitled to and had an equitable lien upon the chickens held by the cold storage company and Edward Terman Company.

The pleadings and the record are exceedingly voluminous but the issues according to the original bill and answers and cross-bill and answers thereto presented for the consideration of the court the question as to whether or not Meyer Terman was a member of the co-partnership and as to whether or not Edward Terman Company had accounted for all the chickens he had received and had placed in cold storage, and as to whether or not he should be required to account for the sum of $1557.67, a sum received for chickens sold by him, he having issued a check for such sum and delivered it to Meyer Terman, the check being payable to the produce company and Meyer Terman having endorsed the same and received the money failed to account therefor to the produce company. Also as to whether or not Beckers had a lien upon the chickens and was entitled to a lien

by reason of the money advanced by him and to the $1557.67 item and the sum of $724.14 which was in the hands of the cold storage company.

The cold storage company deposited the said sum of $724.14 with the clerk of the court to abide the decision of the chancellor. The court in its decree found that there was due from the Farmers Merchants Produce Company to William P. Beckers the sum of $5,000.00 for money loaned to said company; that said Beckers had a valid equitable lien on all the poultry; that Edward Terman had notice of said lien prior to the delivery of the check for $1557.67 to Meyer Terman; that Edward Terman Company be ordered to pay direct to William P. Beckers said amount of $1557.67, together with the sum of $994.55, which represents the amount due on 3343 pounds chickens, and costs of suit; and furthers orders that the sum of $724.14 paid by the North American Cold Storage Company to the clerk of the court to abide the result of the cause be paid to William P. Beckers, and that the Continental and Commercial National Bank and the State Bank of Papineau be dismissed out of the case and that William P. Beckers recover of and by the defendants in the cross-bill his costs by him expended in the prosecution of this suit; that Charles H. Davis pay 40 per cent of the costs incurred in and about the prosecution of this suit and that the appellants William Terman, Meyer Terman and Edward Terman, jointly and severally pay 60 per cent of the costs of the suit. It is from this decree that the appellants prosecute this appeal.

It is insisted by appellants that Meyer Terman was a member of the co-partnership and that he was from the time of its formation. A very labored effort has been made on the part of Edward Terman and William Terman to establish the fact that Meyer Terman was a partner of Davis and William Terman. The reason evidently is that if it be true that Meyer Terman was a member of the co-partnership then the issuing of the check for $1557.67 made payable to the produce company and delivered to Meyer Terman by

Edward Terman would be a delivery to the produce company.

We have examined the record with a view of ascertaining the fact as to whether or not Meyer Terman was a partner. It would serve no good purpose to set out in detail the great volume of testimony bearing upon that question yet when all the evidence is considered it is clear that he was not a member of the co-partnership. Since Edward Terman sold the chickens which were in cold storage and after the selling of the same there remained $1557.67 due the produce company and he having issued a check for said sum payable to the produce company delivered it to Meyer Terman, who was not a partner, was this a payment by him to the produce company? We think the record discloses the fact that Edward Terman at the time he delivered the check to Meyer Terman was in possession of information to the effect that Meyer Terman was not a member of the firm. When this check was delivered to Meyer Terman the firm had ceased to do business four months previously. The partners were quarreling among themselves as to who constituted the partnership and this was known to Edward Terman. Davis and Beckers both testified that they told Edward Terman that this check was to be handled the same as every other check; that is it was to be sent to the bank in Papineau to the account of the firm, namely; the Produce Company. Moreover Edward Terman insists that he had no notice that Becker claimed to have a lien upon the chickens or proceeds for which they might be sold.

When Edward Terman was cross-examined by the solicitor for Beckers he testified as follows:

Q. Now then did you have any notice that William P. Beckers was to be notified when these chickens that were in storage in your name were to be sold?

A. Not to my knowledge.

Q. Did you have any notice or not?

A. No.

Q. You had no notice whatever?

A. Not from William P. Beckers.

Edward Terman really be a partner, to the [illegible] company.

We have examined the record and [illegible] the fact as to whether or not Oliver Terman was a partner. It would serve no good purpose to set out in detail the great volume of testimony bearing upon that question. [illegible] considered it is clear that he was not a member of the partnership. Edward Terman said the company which was in [illegible] age and after the settling of the [illegible] the produce company and he [illegible] payable to the [illegible] was not a partner, and [illegible] he thinks the second [illegible] time he delivered the order to Oliver Terman was in consequence of information to the effect that Oliver Terman was not a member of the firm. When this order was delivered to Oliver Terman the firm had ceased to do business some months previously. The witnesses were questioned being interrogated as to who constituted the partnership and this was known to Edward Terman. [illegible] and Terman both testified that they [illegible] Terman that [illegible] to be member of the firm as [illegible] to the [illegible] to [illegible] of the firm, [illegible] Produce Company. Moreover Edward Terman insists that [illegible] notice that Harper claimed to have a lien upon the [illegible] proceeds for which [illegible] be sold.

[illegible] was cross-examined by the solicitor for [illegible] as follows:

Q. Now then if you [illegible] any notice that William T. Terman was to be notified when these objections that [illegible] in storage on your [illegible] were to be sold?

A. Not in my knowledge.

Q. Did you have any notice or not?

A. No.

Q. You had no notice whatever?

A. Not from William T. Terman.

Q. Did you have it from anybody?

A. From Meyer and Davis.

Q. How was that notice given?

A. Verbal.

Q. Verbal notice?

A. Yes.

Q. This was the only notice you had that William F. Beckers had any interest in the chickens that were stored in your name?

A. Yes.

Q. You are certain about that?

A. You bet.

Q. Can't be mistaken?

A. Absolutely sure of it.

Q. Yes sir. I will ask you to look at complainant's Exhibit 1, and state whether you ever saw that instrument?

A. Yes I did

Q. You did? Your name is attached to that instrument?

A. Yes.

Q. You say you had no other information that William F. Beckers had any interest in those chickens except verbal information?

A. This here says for poultry stored by them after the first of the year, not in my name, it was not in my name, it was their own poultry.

Q. It was their own poultry?

A. Yes.

Qu. Does this say it was their own poultry?

Q. What is the question?

Question read.

A. Yes.

Exhibit 1, under date of May 1, 1922, reads as follows:

"Mr. Davis of the Farmers Merchants Produce Company of Kankakee, Illinois, has turned over the list of poultry which is now in storage at the North American Cold Storage Company, Chicago, for which I agree to the following: The poultry to be sold at 28¢ for the corn fed and 34¢ for the

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milk fed; should this price be not obtainable, Mr. Edward Terman is to notify us by telephone, at our expense the best price that he can obtain. If this price should be satisfactory then Mr. Edward Terman is to receive upon the sale of the poultry ½¢ per pound commission. Mr. Edward Terman also agrees to notify Mr. William P. Beckers or Mr. Charles Davis of Kankakee, Illinois, in ample time so that they may arrange to be in his office at the time the deal is closed. Mr. Edward Terman and Mr. Charles Davis agree to put their signatures on the above agreement."

The agreement is signed by Charles H. Davis and Edward Terman.

Cross-complainant's Exhibit 4 under date of February 25, 1922 states that:- Charles H. Davis and William Terman are the sole partners operating the Farmers Merchants Produce Company located at what is known as the William Terman Produce Company building, Kankakee, Illinois; that they have in storage 39780 boxed dressed poultry in their name at the North American Cold Storage Company and 20550 boxed poultry at the North American Cold Storage in the name of Edward Terman Company. In said exhibit it is agreed that they will not dispose of any of the above poultry without getting permission from Beckers. The exhibit is signed by Charles H. Davis and William Terman.

It will be seen by exhibit 1 Edward Terman agreed to notify Beckers or Davis in advance of the sale of the chickens so that they might be in his office at the time of the closing of the deal. Edward Terman did not notify either Davis or Beckers as he had agreed to do. The record also discloses from the cross-examination of Edward Terman that he, in the first instance, denied having any notice that Beckers was to be notified when the chickens were to be sold. He finally admitted that he had notice from Meyer Terman and Davis and that the notice was a verbal one.

In view of the state of the record we are of the opinion that Edward Terman intentionally placed the power in the hands of Meyer Terman to cheat and defraud the produce company; that the delivery of the check in question was not a payment to the produce company. The cold storage company deposited with the clerk $724.14;

[illegible]

The agreement [illegible]

Tarman.

[illegible]

30, 1932 stating that [illegible] Davis and Tarman [illegible] the sole activity in [illegible] the Company [illegible] located at [illegible] one of the Utility-Tarman [illegible] building, Lexington, Kentucky, [illegible] that they [illegible] dressed poultry in their [illegible] Company and ECCO Retail [illegible] in the name of Utility Tarman Company. [illegible] that they will not discuss [illegible] getting terminated from [illegible]. [illegible] H. Davis and Utility Tarman.

It will be seen [illegible] notify Masters [illegible] that they [illegible] deal. [illegible] had agreed to [illegible] overlooking [illegible] having any notice that [illegible] were to be notified when [illegible] were to be made. [illegible] Tarman and Davis and that [illegible] a retail [illegible].

In view of the [illegible] of the record [illegible] that [illegible] Tarman [illegible] Davis [illegible] to start and [illegible] delivery of [illegible] company. The [illegible] agreement with the [illegible]

said sum was money received from the sale of chickens which were in the hands of the cold storage company, and upon which Beckers claimed to have an equitable lien. The question then arises under the showing made, is Beckers entitled to an equitable lien?

The evidence is undisputed that Beckers had loaned $7,000. to the firm. That $2,000. had been repaid to him. On the 25th day of February, 1922, and after the firm had ceased doing business Beckers had a conversation with William Terman and Davis, partners, and Beckers told Davis and William Terman that he ought to have something to show that he had an interest in the chickens and thereupon Exhibit 4 was signed by Davis and William Terman. The signing of this instrument was for the purpose of giving to Beckers an interest in the chickens mentioned to re-imburse him for his $5,000. At the time of the signing and entering into of Exhibit 4, by Davis and William Terman, it was impossible to get physical possession of the poultry Edward Terman and the North American Cold Storage Company having made advances on the poultry and warehouse receipts being in their hands. Beckers therefore accepted Exhibit 4 as an evidence of his interest in the poultry. The said exhibit described both lots of chickens, those stored in Edward Terman's name and those stored in the firm's name. It was then and there agreed that the poultry should not be sold without getting permission from Beckers. This is in our judgment sufficient under the law to create an equitable lien. The form of the language creating an equitable lien is not very material for equity looks at the final intent and purpose rather than the form. If the exhibit evinces an intention that the lien shall exist, but falls short of its creation, a court of equity proceeds upon the maximum "Equity considers as done that which ought to be done, and will carry out the purposes of the contracting parties." 37 Corpus Juris, 317 Sec. 20.

An equitable lien in personal property may be created by a parole agreement. 37 Corpus Juris 319, Sec. 23.

In the absence of the express contract an equitable lien may arise by implication out of general considerations of right and justice where, as applied to the relation of the parties and the circumstances of their dealings, there is some obligation or duty to be enforced. 37 Corpus Juris 319 Sec. 24.

We are of the opinion therefore that Beckers had an equitable lien on the chickens in question; that this lien follows the proceeds received from the sale of the chickens.

As to that part of the decree that Edward Terman, doing business under the name and style of Edward Terman Company account to the Farmers Merchants Produce Company for 3343 pounds additional poultry, we are not prepared to say that the weight of the evidence sustains the finding. We think the court erred in decreeing him to pay $994.55.

We are of the opinion, therefore, that the decree should be affirmed so far as it relates the items of $724.14 and $1557.87, and in so far as it finds that Meyer Terman was not a member of the co-partnership, and that the decree should be reversed ~~a~~ in so far as it decrees that Edward Terman Company should account for $994.55, for additional poultry it is claimed that he had failed to account for, and the cause is reversed and remanded to the Circuit Court of Kankakee County with directions to enter a decree in conformity with the conclusions herein reached. One fourth of the costs in the Appellate Court should be taxed against Beckers and three-fourths against appellants, appellants to pay the costs of the additional abstract.

Reversed and remanded with directions.

[illegible]

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7987 Agenda 36.

ALBERT C. HAKIN, appellee	:	
vs.	:	APPEAL FROM THE CIRCUIT COURT OF DUPAGE COUNTY.
HUGO KARSTENS, appellant	:	

Jett, J.

This is an action on the case brought by Albert C. Hakin, appellee, against Hugo Karstens, appellant, to recover damages claimed to have been sustained by Hakin, as the result of a collision between the automobiles of the respective parties, on the 11th day of May, 1927, at the intersection of West and Wesley Streets, in the City of Wheaton, DuPage County. A Jury trial was had and a finding in favor of Hakin for $187.50; a motion for new trial was over ruled, as was also a motion in arrest of judgment. Judgment was entered on the verdict in favor of appellee and against the appellant for $187.50, together with costs and charges of suit. Appellant prosecutes this appeal.

For convenience appellee will be called plaintiff, and appellant, defendant. The declaration consists of three counts; the first charges that the plaintiff was driving his automobile in a southerly direction on West Street at a rate of speed of about 15 or 18 miles an hour, and that the defendant Karstens, at the time and place aforesaid, drove his automobile west along and upon said Wesley Street, and across the intersection of said West Street at a speed of to-wit, 25 to 30 miles an hour, and then and there drove his automobile so that it collided with the automobile of the plaintiff.

The second count, in addition to the averments in the first, charges that the collision was the result of reckless and careless driving of the defendant.

7987

ALBERT C. TALKIN, appellee	:
vs.	:
HUGO KLEINKNEWS, appellant	:

left, C.

This is an action on the case brought by Albert C. Talkin, appellee, against Hugo Kleinknews, appellant, to recover damages alleged to have been sustained by Talkin, as the result of a collision between the automobiles of the respective parties, on the 11th day of May, 1917, at the intersection of West and Bailey streets, in the City of Toledo. Upon trial A jury trial was had, and at the close of the case, the court, on a motion for a directed verdict, ordered a verdict in favor of appellee and against the appellant for $[illegible], together with costs and interest. Judgment was entered on the verdict in favor of appellee and against the appellant for $[illegible], together with costs and interest. Appellant prosecutes the error.

The operative facts appellee will be called plaintiff, and appellant, defendant. The collision occurred at three months; the first thought that the plaintiff was driving his automobile in a southerly direction on West Street at a rate of speed of about 15 or 18 miles an hour, and that the defendant driving, at the time and place [illegible], coming in another direction and upon said Bailey Street, and came in the intersection of said two streets at a speed of [illegible] miles an hour, and that and there drove his automobile so that it collided with the automobile of the plaintiff.

The evidence, in addition to the statements in the first, charges that the collision was the result of reckless and careless driving of the defendant.

The third count avers that the plaintiff was driving his automobile in a southerly direction, on West Street, at a speed of about 15 or 18 miles an hour; that the defendant, driving westerly along and upon Wesley Street, drove his automobile at a high rate of speed across the street intersection, so recklessly, carelessly and negligently that it came into collision with the plaintiff's automobile; that there was then and there in full force and effect a public statute of the State of Illinois, which is in the words and figures following, to-wit; "Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along the intersecting highways from the right, and shall have the right-of-way over those approaching from the left."

Each of the counts aver that the plaintiff was in the exercise of due care and caution at the time of the collision of the automobiles, and that he was accompanied by his wife and daughter; that the occupants of plaintiff's automobile were injured, and the automobile damaged; that as a result of the collision he was required to pay out for doctor bills, for his wife and child, to-wit, the sum of $500.00.

To the declaration the defendant pleaded the general issue. The defendant urges a number of reasons for a reversal of the judgment.

Hakin, the plaintiff, testified that he was driving his automobile between 18 and 20 miles per hour before reaching the crossing of Wesley Street, and at the time he reached the crossing of said street, he was driving about 17 or 18 miles an hour; and that he was past the middle of the street when the car struck him; that he saw a car coming from the east when he was a few feet from the corner of the intersection; that it was about two thirds or half a block away. A witness by the name of McCabe, called by the plaintiff, testified that he followed a car down West Street, traveling south, and saw a car coming from the east, and the two cars collided; that he imagined the car traveling south

The third count was that the defendant, in driving his automobile in a southerly direction, on Sept. [illegible], at a speed of about 15 or 18 miles an hour; that he approached, driving westerly along and upon Leslie Street, [illegible] the [illegible] high rate of speed across the street intersection, [illegible], carelessly and negligently that it came into collision with the plaintiff's automobile; that there was then and there an [illegible] force and effect a public statute of the State of Illinois, which is in the words and figures following, to-wit: "Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching from along the intersecting highways from the right, and shall have the right-of-way over those approaching from the left."

One of the counts alleged that the plaintiff was in the exercise of due care and caution at the time of the collision of the automobiles, and that he was accompanied by his wife and daughter; that the occupants of plaintiff's automobile were injured, and the extent thereof; that as a result of the collision he was required to pay out for doctor bills, for his wife and child, to-wit, the sum of $500.00.

To the declaration the defendant pleaded the general issue. The defendant urges a number of reasons for a reversal of the judgment.

Veis, the plaintiff, testified that he was driving his automobile between 12 and 1 o'clock at noon before reaching the crossing of Leslie Street, but at the time he reached the crossing of said street, he was driving about 17 or 18 miles an hour; and that he was near the middle of the street when the car struck him; that he saw a car coming from the east when he was a few feet from the corner of the intersection; that it was about two blocks or half a block away. [illegible] witness by the name of [illegible], called by the plaintiff, testified that he [illegible] a car from east Street, traveling south, and saw a car coming from the west, and the two came collided; that he [illegible] the car [illegible] south

was going at about 20 miles an hour.

William J. Kleiser testified on the part of the plaintiff, that he witnessed the automobile accident in West and Wesley Streets; that he was coming out of Wheaton Avenue, by a corner known as Pittsford Corner, and that Karstens' car passed him at the corner and he followed behind it, going about 18 miles an hour, and Karstens ran away from him; that he had been driving a car for about ten years; that he had been an automobile mechanic in the army, and had driven his own car for five years; that in his opinion the speed of defendant's car, at the time it passed him, and from then on to the point of impact, was from 28 to 30 miles an hour; that he couldssee the intersection of West and Wesley Streets; that he saw plaintiff's car coming out on to the intersection, and believed it was traveling around 20 miles an hour; that there was a line in the center of Wesley Street; the defendant was driving on the Center of that line, and perhaps a little past it to the south; that he could see the impact when the cars came together; that the plaintiff's car was struck on the front, and then side-swiped.

A. M. Kern, testified that he was a police officer in the City of Wheaton on the day of the accident; that he received a call and went to the corner of West and Wesley Streets, at about five o'clock, found two cars there, one of them belonging to Hakin; that Hakin's car was on the southwest corner of West and Wesley Streets; that the front of the car, that is the right half thereof, was on the curb; that Karstens car was about 15 feet to the south in front of Hakin's car, in a southwest angle, about three feet from the curb; that he didn't know whether a half of the car was on Wesley or West street; that Karstens car was about 15 feet to the south in front of Hakin's car at a southwest angle, about three feet from the curb; the police officer further testified that he asked Karstens, the defendant, to tell him how the accident happened; the defendant said he was coming from the east and was going 20 miles an hour; that when he got to the crossing he had bwen run into by another car which was Hakin's.

The witness asked Karstens about the tracks on the streets and Karstens said they were his tracks caused by the sliding of the tires. The police officer testified that they were south of the center of the road on Wesley Street, the left rear tire to the south of the middle of Wesley Street, angling southward at the intersection. The witness further testified that Karstens said he was coming from work and noticed a man by the name of Selander driving west on Wesley Street and had looked to say hello to Selander; Selander was waving to him and he didn't see the other car until it hit him.

Mrs. Lenora O'Hagan, called by the plaintiff, testified she was on her front porch; that she looked up and saw a car coming from the north on West Street and after the driver had driven his car past the center of West Street, going south, a car came along from the east on Wesley Street and struck the other car, throwing it to the west of the center of Wesley Street and towards the curb at the corner.

The defendant, among other things, testified that as he approached the intersection of West and Wesley Streets he was driving about twelve miles an hour; that he looked to the north and saw nothing in the way of an automobile coming from that direction and he continued on his way; he looked to the left and saw Mr. Selander and his brother-in-law coming along; as he came opposite them he bid them the time of day and had scarcely turned his head when some thing struck him coming from the north. which threw him off his balance; that when the impact came his car was about seven and one-half feet past the man-hole, west of the man-hole; the man-hole is about in the center of the intersection of the two streets.

Selander, who was driving his wagon and team toward the north, on West Street, near the intersection in question, testified that he saw Karstens first and then looked up the road and saw the plaintiff, Hakin coming, and looking toward the west; that Hakin was gaining time on Karstens and Hakin kicked Karstens over and Karstens car came toward his wagon.

[illegible]

Arendt testified he was on the wagon with Selander and saw Karstens car coming from the east. The front end of the car of the defendant was about three feet from the man-hole when plaintiff's car hit the car of the defendant on the right side and swerved it south into West Street.

The defendant insists that the verdict of the jury is contrary to, and manifestly against the weight of the evidence. We have examined the record bearing upon this suggestion of the defendant and are of the opinion the court did not err in refusing to direct a verdict, either at the close of the plaintiff's testimony or at the close of all the evidence.

After an investigation of the record we are not prepared to say that the court committed reversible error in the admission of evidence. Instructions (1) and (2), given for the plaintiff, bearing upon the question of who was entitled to the right of way as the respective cars approached the intersection, are criticised. We are of the opinion that the instructions are subject to criticism, but in view of our finding of the facts, we think that the verdict and judgment is supported by the evidence. Substantial justice has been done, and the judgment of the Circuit Court of Du Page county will be affirmed.

Judgment affirmed.

Already testimony has been on the witness stand tending to show that Kersteens car struck from the rear. The front end of the car of the defendant was almost torn off from the rear. The plaintiff's car left the car of the defendant on the right side and swerved it across the road diagonally.

The defendant insists that the verdict of the jury is contrary to, and manifestly against the weight of the evidence. We have examined the record bearing upon this suggestion of the defendant and are of the opinion the court did not err in refusing to direct a verdict, either at the close of the plaintiff's testimony or at the close of all the evidence.

After an investigation of the record we are not inclined to say that the court committed reversible error in the admission of evidence. Nevertheless in the (1), prima facie, bearing upon the question of the use of the right of way as the respective rights of the parties, are criticized. We are of the opinion the instruction may be open to criticism, but in view of the finding of the court, we think the verdict and judgment is supported by the evidence. Substantial justice has been done, and the judgment of the Circuit Court of Du Page county will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal ot said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice,
Hon. FRANKLIN H. BOGGS, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7952 Agenda No. 2.

In The

APPELLATE COURT OF ILLINOIS,

Second District.

October Term, A.D., 1928.

Alexander R. Duncan, David R. Forgan, Charles W. Folds, B. A. McDonald, C. Roy Warren, William H. Grimes, James C. Fenhagen and John D. Larkin, Jr., Trustees of Commercial Credit Trust, Appellants,	)	Appeal from Circuit Court of Winnebago, County.
vs.	)	
A. H. Bennett, Appellee.	)	

OPINION by BOGGS, J.

Appellants, as the Commercial Credit Trust, instituted an action in replevin against appellee in the Circuit Court of Winnebago County. The declaration consisted of two counts. The first count charged a wrongful taking and the second a wrongful detention of a certain automobile. To the declaration, appellee filed pleas of non cepit, non detinet, a plea of property in the appellee, a plea of property in a third party, and a plea of tender.

A jury being waived, a trial was had before the court, on a stipulation of facts, accompanied by certain documentary evidence. The court found property in appellee. Judgment was rendered thereon, and a writ of retorno habendo was awarded. To reverse said judgment, this appeal is prosecuted.

Said stipulation was in substance as follows: On March 26, 1927, appellee contracted with one M. W. Barenche for the automobile in question and a conditional sales contract was executed pursuant thereto. Said contract was, on the same day,

General No. [illegible] Judgment No. [illegible].

In the

[illegible]

[illegible]

[illegible], [illegible], 1920.

Alexander T. [illegible], [illegible]
Dan, Charles T. [illegible]
Donald, C. [illegible], [illegible]
Grimes, James G. [illegible]
John T. [illegible], [illegible], [illegible]
Commercial [illegible]
[illegible]

[illegible]

A. T. Bennett,
[illegible].

[illegible] by [illegible], J.

Appellant, in the Commercial Court [illegible], instituted an action in [illegible] against appellee in the District Court of Hennepin County. The [illegible] of the [illegible]. The trial court [illegible] a verdict [illegible] a verdict. [illegible] detention of a [illegible]. In the [illegible], appellee filed plans of [illegible], [illegible], a plan [illegible] the appellee, a [illegible] in a [illegible], and a [illegible] tender.

[illegible] being [illegible], a [illegible] and [illegible] or a stipulation of [illegible], [illegible] evidence. The [illegible] rendered [illegible], [illegible] was [illegible]. [illegible] reverse [illegible], this [illegible].

[illegible] was in [illegible] on [illegible] 20, 1927, [illegible] [illegible] [illegible] autonomous in [illegible] and [illegible] executed [illegible] thereto. [illegible], [illegible]

assigned to the Commercial Credit Trust, an unincorporated association composed of appellants. Thereafter, certain payments were made on said contract, and on October 21, 1927, there was unpaid thereon the sum of $370.35. Appellants having made demand therefor appellee proffered payment upon appellants executing a bill of sale. Appellants countered by offering to cancel said note and sales contract, and to deliver the same to appellee. It being insisted by appellants that they were not required to execute a bill of sale in order to entitle them to payment of the balance of said contract. Appellants were refusing to execute said bill of sale on account of certain irregularities in connection with the handling of automobiles by Barrenche.

In the documentary evidence stipulated were the following letters. Letter of September 22, 1927, by appellants, to appellee, contains the following:

"Replying to your letter of the 19th, we beg to advise that, because of the rather involved and irregular condition of M. W. Barrenche's affairs, we feel unable to give you a bill of sale on this car, because of the possibility of complications in the event someone else has a prior lien. We do not believe such a condition exists, but it is in line with our policy not to issue such a bill of sale at this time. The release of the paid in full contract and judgment note on this account are, we believe, all the evidence necessary to indicate that our account has been satisfied and that the purchaser is no longer indebted to us."

In a letter written September 28, 1927, appellants say, among other things: "We hold title to the automobile which Mr. Bennett has under the conditional sales contract which was made out by Barrenche and signed by Mr. Bennett, and upon transferring this contract and judgment note to Mr. Bennett's possession, with our indorsement indicating that the account is fully satisfied, we fail to see where Mr. Bennett could possibly be taking any chance."

Appellants contend: First, that "the alleged tender (by appellee), being conditional, is invalid." Second, "that the

assigned to the Commercial Credit Trust, an unincorporated association composed of appellants. Thereafter, certain payments were made on said contract, and on October 21, 1927, there was unpaid thereon the sum of $[illegible]. Appellee in writing said demand therefor appellee produced present upon appellants crediting a bill of sale. Appellants submitted to it which to counsel said note and sales contract, and to deliver the same to appellant. It being insisted by appellants that they were not required to execute a bill of sale in order to entitle them to payment of the balance of said contract. Negotiations were continued to execute said bill of sale on account of certain irregularities in connection with the handling of automobiles as [illegible].

In the transcript appears evidence [illegible] letters. Letter of September 7, 1927, by appellants, to appellee, contains the following:

"Replying to your letter of the 16th, we have to advise that, because of the rather involved and irregular condition of A. W. Barrenchea's affairs, we feel unable to give you a bill of sale on this car, because of the possibility of complications in the event somewhere else has a prior lien. We do not believe such a condition exists, but it is in line with our policy not to issue such a bill of sale at this time. The release of the note and in full contract and in exchange for the account due, we believe, all the evidence necessary to indicate that the account has been satisfied and that the [illegible] is no longer interested to us."

In a letter written September 26, 1927, appellants set, among other things: "We will title to the automobile upon Mr. Bennett has under the conditional sales contract which was made out by Barrenche and signed by Mr. [illegible], and upon transferring this contract and indorsement note to Mr. Bennett's assignee, with our indorsement indicating that the account is fully satisfied, we fail to see where Mr. Bennett could possibly be taking any chance."

Appellants stand: First, that [illegible] (by appellee), being constructed, in [illegible] [illegible]

tender, to be valid, must always be kept good." Third, "That the bill of sale provided for in the motor vehicle act, is inoperative to the facts in issue." Lastly, "if the court construes said Act as operative, the same is therefore unconstitutional, because the effect is to distinguish automobiles as a distinct class of merchandise, whereby a seller must convey title absolutely by a bill of sale, and not under conditional sale contract or as provided by the Uniform Sales Act."

The first point raises the question as to the right of appellee to demand a bill of sale. Paragraph 18 of chapter 952, Cahill's Statutes, among other things provides that: "Upon the sale of a motor vehicle by a manufacturer or dealer, he shall thereupon give to the purchaser a bill of sale, setting forth the names and addresses of the purchaser, the date of purchase, together with a description of such motor vehicle, showing names of the manufacturer, style, factory and engine numbers, and amount of the horse-power," etc. The contract entered into between Barrenche and appellee reserved the title to said automobile to the seller until full payment therefor had been made. As stated, said contract was assigned on the same day to appellants. Appellants, in the letter above set forth, state that the title to said automobile was in them. It therefore follows that, under said statute appellee was entitled to a bill of sale, and was warranted in making his tender conditional thereon.

On the second proposition, it is only necessary to say that the correspondence in evidence discloses that appellee, prior to the beginning of said suit, had tendered to appellants the amount they were claiming on said contract. The stipulation shows "that the sum of $370.35 is now tendered in open court, under the same circumstances as heretofore offered."

No propositions of law were tendered by either side on the hearing of said cause, and no question was raised in the trial court with reference to said tender, other than it was insisted that the same was a conditional tender, which contention we have held is not good. As to the third proposition, a reading of the statute above quoted clearly discloses that it is

tender, to be valid, must always be held good. Hence, where the bill of sale provided for in the motor vehicle act, is inconsistent to the tender in issue." Usually, if the court treats of said Act as operative, the case is therefore materialized, because the effect is to disinherit commodities of a kind where of merchandise, whereby a seller may convey title absolutely by a bill of sale, and not under conditional sale covered by or provided by the Uniform Sales Act.'

The first point raises the question as to the right of appellee to demand a bill of sale. Section 18 of chapter 208, Cahill's Stat. 1924, among other things provides that: "Upon the sale of a motor vehicle by a manufacturer or dealer, he shall thereupon give to the purchaser a bill of sale, setting forth the name and residence of the purchaser, the date of purchase, together with a description of such motor vehicle, showing name of the manufacturer, style, factory and engine number, and amount of the lower-- ment." etc. The contract existed into between Sarcenno and appellee required the title to said automobile to the said in full payment therefor had been made. As stated, said contract was signed on the same day as appellee. Appellants, in the latter case not found, stated that the title to said automobile was in them. It therefore follows that, under said statute appellee was entitled to a bill of sale, and was entitled to maintain his tender conditional thereon.

In the second proposition, it is only necessary to say that the court refused to witness discloses that appellee, prior to the tendering of said note, had tendered to appellants the amount they were claiming on said contract. The stipulation shows that the sum of $270.00 was tendered in open court, under the usual circumstances to satisfactorily offered."

To propositions of law are considered by either side on the hearing of said cause, and no question was raised in the trial court, with reference to said tender, other than it was insisted that the said was a conditional tender, which contention we have noted is not good. As to the third proposition, a reading of the statute shows certain clearly discloses that it is

applicable to the facts stipulated.

There are two answers to appellants' fourth contention. First, as above stated, no propositions of law were submitted. The constitutionality of said act was therefore not raised in the trial court and cannot be raised for the first time on appeal. Second, having appealed said cause to this court, and this court having jurisdiction of the questions raised on the assignment of errors except as to the constitutionality of said statute, that question is therefore waived. Case v. City of Sullivan, 222 Ill. 56-63; P. C. C. & St. L . Ry. Co. v. Chicago, 242 Ill. 178-185; Luken v. L. S. & M. S. Ry. Co., 248 Ill. 377-385; Armour & Co. v. Industrial Board, 275 Ill. 328-335; Chicago-Sandoval Coal Co. v. Industrial Commission, 301 Ill. 389-392.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

applicable in the case at bar.

There are two reasons to sustain the trial court's decision.

First, as stated above, [illegible] were conflicting. The conflicting evidence [illegible] to the trial court to [illegible] trial court [illegible] to grant the [illegible] new trial. Second, [illegible] in the trial court, we will grant having jurisdiction on the questions raised on the evidence of errors except [illegible] [illegible] that [illegible] [illegible] 111. 56-64; [illegible] v. [illegible], [illegible] 185; [illegible] 8 Ill. v. [illegible] Ill. 782-783; [illegible] Co. v. [illegible] Ill. [illegible].

[illegible] the trial court, the judgment of the trial court will be affirmed.

[illegible] affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8012 Agenda No. 22.

In The

APPELLATE COURT OF ILLINOIS,

Second District

February Term, A. D., 1929.

PEOPLE OF THE STATE OF ILLINOIS ex rel. ANDREW RUSSELL as Auditor of Public Accounts of the State of Illinois, appellee, vs. FARMERS STATE & SAVINGS BANK (ROBERT B. HAMMANN, Petitioner), appellant.	Appeal from the Circuit Court of Kankakee, County.

OPINION by BOGGS, J.

A bill was filed in the circuit court of Kankakee County by the Auditor of Public Accounts, to wind up the affairs of The Farmers State and Savings Bank of Grant Park, Illinois. A decree was entered on April 10, 1920, appointing appellee receiver of said bank, and ordering him "to take possession of the books, records and assets of every description of said Bank, and to collect all debts, dues and claims belonging to it, and to hold and administer the same under the direction of this Court."

On April 14, 1928, appellant filed a sworn petition alleging that he is the school Treasurer of Township 32 North, Range 13 in said county; that he filed a claim against said Bank for $5632.00; "that said last mentioned sum was school money, which your petitioner deposited in said bank as a trust fund belonging to said Trustees of Schools; that afterward said Receiver paid to your petitioner one half of said sum, and the balance of said trust fund, to wit $2816.00, has not been paid, or any part thereof."

General No. 8012 Docket No. 22.

In the

Intermediate Court of Illinois,

Second District.

(January term, A. D., 1922.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ANDREW ROTHERT, Auditor of Public Accounts of the State of Illinois,

appellee,

vs.

FARMERS STATE & SAVINGS BANK,
(ROBERT E. LUDWIGSEN, Petitioner),

appellant.

Appeal from the Circuit Court of Lee County.

Abstract by DOYLE, J.

A bill was filed in the circuit court of Lee County by the Auditor of Public Accounts, to wind up the affairs of the Farmers State and Savings Bank of Steward, Illinois. Receiver was entered on April 10, 1922, appointing appellee receiver of said bank, and ordering the "immediate preservation of the assets, and collection of every description of said bank, and to collect all claims, dues and claims belonging to it, and to do and exercise the same under the direction of this court."

On April 11, 1922, appellant filed a petition, alleging that he is the school treasurer of Township 21 North, Range 12 in said county; that he filed a claim with the receiver for $5622.00; "that said last mentioned sum was deposited, which your petition deposited in said bank on a time deposit payable to said Trustees of Schools; that subsequent said receiver paid to your petitioner one half of said sum, and that balance of said claim, to wit: $2811.00, has not been paid, or not yet matured."

Said petition prayed that the receiver be ordered to pay appellant said balance of $2816.00 a in full, etc.

On August 3, 1928, the receiver filed a petition for an order directing the manner of payment of certain claims, alleging that "among the various deposits in this said Bank were a number of accounts which had been deposited by various individuals, institutions, organizations or groups of persons, " listing 39 accounts, the total of which was $10,018.39, and among which is "Robert B. Hamman, Treasurer, $5685.92." The petition further alleges that proofs of said claims were made; that the receiver "had treated each of said accounts as being an ordinary account, and has paid out to the various persons, organizations or groups of people hereinbefore listed, 50% of the amounts shown hereinbefore as being due and owing to the said persons, organizations or groups of people; that the payment so made is the same payment that has been made to every creditor of said Bank who has made due proof of his, her or its account."

Said petition further alleges that each of said persons, etc., "now demand that each of the accounts hereinbefore listed * * * be declared preferred or prior claims, and that said deposits be paid out in preference and priority to all other claims now on file, * * * by reason of the fact that the same are trust funds; that your petitioner does not know of his own knowledge whether the said deposits are trust funds or not," and prays that said matter be set down for hearing and that the court "enter such necessary order or orders as may be required to direct and guide your petitioner as receiver of said Bank in the matter of the payment of said claims," etc.

Upon hearing, a decree was rendered, finding that said claims, including the claim of appellant, were not entitled to preference "and that such said funds, whether they be trust funds or not, have no preference or priority as to payment."

To reverse said decree appellant prosecutes this appeal

Said petition prayed that the receiver be relieved from complaint said balance of $2016.00 a in full, etc.

On August 3, 1932, the receiver filed a petition for an order directing the manner of payment of secured claims, alleging that "among the various deposits in this said bank were a number of accounts which had been designated as belonging to fraternal institutions, organizations or groups of persons," listing 39 accounts, the total of which was $[illegible], and among which is "Robert L. Hannan, Treasurer, $5889.92." The petition further alleges that proofs of said claims were made, that the receiver had treated each of said accounts as being an ordinary account, and has paid out to the various persons, organizations or groups of people mentioned before listed, 50% of the amounts shown hereinbefore as being due and owing to the said persons, organizations or groups of people; that the payment so made is the same percent that has been made to every creditor of said bank who has his due proof of claim, say of its account."

Said petition further alleges that each of said persons, etc., "now demand that each of the accounts hereinbefore listed * * * be declared preferred or prior claims, and that said deposits be paid out in preference and priority to all other claims now on file, * * * by reason of the fact that the same are trust funds; that your petitioner does not know of his own knowledge whether the said deposits are trust funds or not," and prays that said matter be set down for hearing and that the court enter such necessary order or orders as may be required to direct and guide your petitioner as receiver of said bank in the matter of the payment of said claims," etc.

Upon hearing, a decree was rendered, finding that all claims, including the claim of appellant, were not entitled to preference "and that such trust funds, whether they be trust funds or not, have no preference or priority as to payment."

To reverse said decree appellant prosecutes this appeal

Appellant testified on the hearing that he was school treasurer in said Township, and that he deposited the school funds in the Farmers State and Savings Bank. He further testified: "Cashier was Charles Rayhorn. I told him when I made the deposit that it was school money, belonging to the school fund. He made the entires of that deposit in this book which is the passbook given me by him. * * * I did not at any time intermingle these funds of m with any funds of my own. Kept a separate and distinct account. I had a separate personal account of my own and a separate pass book."

The pass book, which was offered in evidence, is entitled:

"Savings Department.

The Farmers State & Savings Bank of Grant Park

In Account With

No. 60

Robert B. Hamann, Treasurer.

Savings Account.

This book must be presented when money is withdrawn from it. Four Per Cent Interest on Savings Deposits Compounded Semi-Annually."

The entries in the pass book show a deposit on March 30, 1917, of $5893.60, and on April 13, 1918, of $880.00; certain withdrawals in 1917, 1918 and 1919; credits for interest payments by the bank, made on June 30 of each year, and a balance on July 15, 1919, of $5632.73. No other evidence was offered by appellant or by the receiver.

It is contended by appellant that said bank held said fund in trust, and that he is entitled to have said claim preferred.

Section 68 of chapter 122, Cahill's Statutes, provides among other things that the bond required to be given by a township treasurer of school funds shall be conditioned "that he shall faithfully discharge the duties of his office according to law, and deliver to his successor in office, * * * all moneys, books, apapers, securities and property which shall come into his hands or control as

A petitioner testified on the hearing that he was school treasurer in said township, and that he deposited the school funds in the Farmers State and Savings Bank. He further testified: "Gaynor was Charles Gaynor. I told him when I made the deposit that it was school money, belonging to the school fund. He made the entries of that deposit in this book which is the passbook given me by him. * * * I did not at any time intermingle these funds of a with any funds of my own. Kept a separate and distinct account. I had a separate personal account of my own and a separate pass book."

The pass book, which was offered in evidence, is as follows:

"Savings Department.

The Farmers State & Savings Bank of Grant City

in account with

$. 00¢

Robert G. Gaynor, Treasurer.

Savings Account.

This book must be presented when money is withdrawn from it. Form 101 Int. Interest on Savings De posits Compounded Semi-Annually."

The entries in the pass book show a deposit on March 30, 1917, of $884.60, and on April 12, 1916, of $88.40; several withdrawals in 1917, 1916 and 1915; credits for interest received by the bank, made on June 30 of each year, and a balance on July 15, 1919, of $3032.77. No other evidence was offered by appellant or by the receiver.

It is contended by appellant that said fund not only fund in trust, and that he is entitled to have said claim preferred.

Section 88 of chapter 126, Smith's statutes, provides among other things that the fund required to be given by a commonwealth treasurer of school funds shall be conditioned "that he shall faithfully discharge the duties of his office according to law, and deliver to his successor in office, * * * all moneys, books, papers, securities and property which shall come into his hands or control as

such township treasurer from the date of his bond up to the time that his successor shall have qualified."

Section 71 of the same chapter provides: "The township treasurer shall be the only lawful depositary and custodian of all township and district school funds, and shall demand, receipt for and safely keep, according to law, all bonds, mortgages, notes, moneys, effects, books and papers of every description belonging to his township."

The supreme court has held in numerous cases, that a school treasurer is an insurer as to the funds committed to his charge. Thompson v. Board of Trustees, 30 Ill. 95-102; Swift v. Trustees of Schools, 189 Ill. 584-588; Trustees of Schools v. Cowden, 240 Ill. 39-44. In People v. McGrath, 279 Ill. 550, the Court at page 557 says:

"The rule of law is well settled in this state that a public officer and his sureties are liable upon his official bond for moneys received by him by virtue ~~of his fo~~ of his office as an insurer, and are not relieved from liability by loss of the money without the officer's neglect or default. It was so held in Estate of Ramsey v. People, 197 Ill. 572; Swift v. Trustees of Schools, 189 Ill. 584; Oeltjen v. People, 160 Ill. 409; and Thompson v. Board of Trustees, 30 Ill. 99. In those cases it was clearly decided that the liability of an officer was not that of a bailee, but that he was an insurer of the funds coming to his possession, and could not be relieved from payment by unavoidable accident or by the misfeasance or negligence or felony of another, or by any other reason than the act of God or the public enemy. The same doctrine is held in United States v. Prescott, 3 How. 578, and Smyth v. United States, 188 U. S. 156."

The statute further makes it the duty of a township treasurer "to keep the principal of the township fund loaned at interest, * * * secured by mortgages on unencumbered realty situated in this state, worth at least 50% more than the amount loaned."

It will therefore be observed that appellant, as such

such township treasurer from the date of his bond up to the time that his successor shall have qualified."

Section 71 of the same chapter provides. "The township treasurer shall be the only lawful custodian and receiver of all township and district school funds, and shall hold, receive, keep for and safely keep, according to law, all books, securities, moneys, effects, books and papers of every description belonging to his township."

The supreme court has held in numerous cases, that a school treasurer is an officer as to the funds committed to his charge. Thompson v. Board of Trustees, 30 Ill. 99-102; Smith v. Trustees of Schools, 189 Ill. 384-389; Trustees of Schools v. Cowden, 240 Ill. 39-44. The People v. Coffeath, 271 Ill. 530, the Court at page 537 says:

"The rule of law is well settled in this state that a public officer and his sureties are liable upon his official bond for moneys received by him by virtue of his office as an insurer, and are not relieved from liability by loss of the money without the officer's neglect or default. It was so held in Estate of Ramsey v. People, 127 Ill. 672; Swift v. Trustees of Schools, 125 Ill. 484; Dalton v. People, 160 Ill. 604; and Thompson v. Board of Trustees, 30 Ill. 99. In those cases it was clearly decided that the liability of an officer who got that of a bailee, but that he was an insurer of the fund coming to his possession, and could not be relieved from payment by unavoidable accident or by the misfeasance or negligence or tolonr of another, or by any other reason than the act of God or the public enemy. The same doctrine is held in United States v. Prescott, 3 How. 578, and Smith v. United States, 188 U. S. 180."

The statute further makes it the duty of a township treasurer "to keep the principal of the township fund loaned at interest, * * * secured by mortgage on unencumbered realty situated in this state, worth at least 50% more than the amount loaned."

It will therefore be observed that appellant, as such

treasurer, was not following the statute with reference to the loan-ing of said funds. By placing said funds on deposit with said bank, with a provision that 4% interest should be paid thereon, he was incurring a liability which he need not have incurred had he followed the provisions of the statute.

Even though it be conceded that appellant, on making the deposit of said funds with said bank, stated to the cashier that the same were school funds, and even though appellant did not mingle said funds with his personal funds, the bank did not thereby become a trustee of said fund, so as to give the same a preference. To so hold would be in effect to hold that the bank could dissipate its assets in the payment of interest for the mere privilege of keeping a fund as a special deposit, without having any use theref. The evidence in this case wholly fails to disclose any request or direction to said bank to keep said fund intact and separate. The conclusive implication from the agreement to pay interest is that it was not so to do, but was to commingle the same with its other assets for the purpose of making loans and profiting thereb . This being the state of the record, appellant would not be entitled to a preference.

While it has been frequently held that money held in a fiduciary capacity by one who places it in a bank can be recovered from the bank by the beneficiary or cestui que trust, where the fund can be traced and indentified, (School Trustees v. Kerwin, 25 Ill. 73-77; Kirby v. Wilson, 98 Ill. 240-247; Woodhouse v. Crandall, 197 Ill. 104-110; People v. Iuka State Bank, 229 App. 4-10), the particular fund must be capable of indentification. There must be a preservation of the distinctness of said fund. Woodhouse v. Crandall, supra, 111; Wetherell v. O'Brien, 140 Ill. 146-152; Union National Bank v. Goetz, 138 Ill. 125-135. The burden of proof is upon the one claiming a specific lien upon assets in the hands of an assignee for the benefit of creditors. Union Trust Co. v. Trumbull, 137 Ill. 146-179. In Bayor v. American Trust & Savings Bank, 157 Ill. 68, the court says:

"It has frequently been announced as the law of this

treasurer, was not following the authorized [illegible] reference to the loan-ing of said funds. A [illegible] could have no deposit with said bank, with a provision that [illegible] interest should be paid thereon, he was incurring a liability which he could not have [illegible] had he followed the provisions of the statute.

Even though it be conceded that [illegible] deposit of said funds with said bank, [illegible] that [illegible] were general funds, and even though [illegible] said funds with his own [illegible], the bank did not [illegible] a trustee of said funds, so as to give the [illegible]. So no lien would be in effect to hold [illegible] its assets in the [illegible] keeping a fund as a [illegible], without [illegible]. The evidence in this case [illegible] direction [illegible] The [illegible] that it [illegible] its other [illegible] thereby. [illegible] not be entitled to a [illegible].

While it has been [illegible] fiduciary [illegible] from the bank by the fiduciary or [illegible] fund can be [illegible] [illegible] 25 Ill. [illegible]; [illegible] v. [illegible], 26 Ill. 240-242; [illegible] v. Crandall, 17 Ill. [illegible]; [illegible] v. [illegible], [illegible] 4-10), the [illegible] There must be a [illegible] of the distinctness of the fund. [illegible] v. [illegible], [illegible], 111 [illegible] v. [illegible], [illegible] 145-152; [illegible] v. [illegible], [illegible] 1[illegible]. [illegible] [illegible] of profit is [illegible] assets in the funds of the [illegible] for the benefit of [illegible] Union Trust Co. v. [illegible], 107 Ill. [illegible]. [illegible] Indiana [illegible] Savings Bank, [illegible] 1. [illegible]

"It has frequently been [illegible]

State that even in a case where a definite and actual trust fund which possesses all the attributes of a separate and distinct identity, has been so mixed and mingled with other funds as to render identification impossible, the cestui que trust, in the event of the insolvency of the trustee, is remitted to the position and the rights of a general creditor." Citing Trustees of Schools v. Kirwin, supra; Otis v. Gross, 96 Ill. 612; Wetherell v. O'Brien, supra; Union National Bank v. Goetz, Supra; Mutual Accident Association v. Jacobs, 141 Ill. 261.

It should also be observed that the major portion of said fund was deposited in March, 1917, and "that the total reserve of said Bank, on March 25, 1920," as found by the trial court, "was less than ~~whell~~ three percent of its total deposit liabilities, and that said Bank is wholly and irretrievably insolvent." The right to priority of a special depositor in an insolvent bank is limited to the smallest amount of cash on hands in the bank and deposited to its credit in correspondent banks, subsequent to the commingling of the deposit with the general funds of the bank. People v. Iuka State Bank, supra, 13; Woodhouse v. Crandall, supra; Macy v. Roedenbeck, 227 Fed. 346; People v. Auburn State Bank, 215 App. 133. There was no attempt to prove that at the date the receiver took charge, said bank had any cash whatever in its vaults, or any sums of money on deposit with correspondent banks. It therefore follows that this decree must be affirmed, if for no other reason than the failure of appellant to make this proof.

It is insisted by counsel for appellee that the decree of order here appealed from is merely an interlocutory order, and that the appeal should be dismissed for that reason. This point is not well taken. Said order in effect fixed the rights of the parties in said funds. It was therefore an appealable order. Kavanagh v. Bank of America, 239 Ill. 404-406; People v. Illinois State Bank, 312 Ill. 614.

For the reasons above set forth, the decree of the trial court will be affirmed.

Judgment affirmed.

State that even in the case of a fiduciary and natural person, that which possesses all the attributes of a person in its relations, identity, has been so blurred and merged since corporate fraud, or to render identification impossible, the person who seeks, in the event of the insolvency of the trustee, to realize on the position and the rights of a general creditor." Citing Company of Columbia v. Tilden, supra; Cline v. Tuck, 61 Ill. 339; Wet Wall v. Fisher, supra; Union National Bank v. Chase, Trust Mutual Accident Association v. Bartlett, 143 Ill. 543.

It should also be observed that the amount of said fund was deposited in June, 1911, and "when the total amount of said Bank, on June 30, 1912, as found by the total amount, was less than [illegible] of the total deposit [illegible] and that said bank is wholly and irreconcilably insolvent." The right to priority of a special depositor in an insolvent bank is limited to the smallest amount of cash on hand in the bank and deposited to its credit in corresponding funds, subsequent to the commingling of the deposit with the general funds of the bank. Morris v. State Bank, supra, 17; Woodmansee v. Crandall, supra; Ely v. Cedarburg, 229 Ind. 340; [illegible] v. Auburn State Bank, 217 Ind. 1. There was no attempt to prove that at the date the receiver took charge, said bank had any cash-over in its vaults, or any sums of money on deposit with correspondent banks. If the contrary fact was, this latter must be affirmed, if for no other reason than the failure of appellant to make this proof.

It is insisted by counsel for appellee that the matter of order here appealed from is merely an interlocutory order, and that the appeal should be dismissed for that reason. This point is not well taken. Said order in effect fixed the status of the parties in said fund. It was therefore an interlocutory order. Lawrence v. Bank of America, 203 Ill. [illegible]; Lewis v. Illinois State Bank, 213 Ill. 314.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On Apr 10 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Fritz Ellison and Esther Ellison, appellants,	:	Appeal from the Circuit Court of Winnebago County.
7951 v.	:	
Erick Ellison, Administrator, etc., et al, appellee,	:	

JONES, P.J.

Esther Ellison and Alva Lonn, as copartners, owned and operated a restaurant under the name of "Svea Cafe". Esther Ellison died February 6, 1927, and Erick Ellison was appointed administrator of her estate.

On February 19, 1927, the surviving partner filed an inventory showing the partnership assets and liabilities. On the same day he procured an order of the probate court to sell at private sale, the half interest of decedent in the copartnership business.

On March 1, 1927, the administrator gave Fritz Ellison and his wife, whose name is also Esther Ellison, a bill of sale in the usual form for"the undivided one-half of the copartnership property of Esther Ellison, deceased, and Alva Lonn, doing business as the Svea Cafe". The consideration as expressed therein is $2500. At the same time a written contract was executed between the parties, reciting that it was not yet determined how the consideration of $2500 should be paid in order to protect the purchasers; that the bill of sale and the purchase money should be left in escrow with the Commercial National Bank of Rockford, Illinois, until it was determined by the probate court of that county how the money should be paid; and that upon such determination the bank should pay the money under the order of the court and deliver the bill of sale to the purchasers. The bill of sale and the purchase money were deposited in escrow as provided by the contract. Alva Lonn and appellants conducted the business together from March 1, 1927, to about February 1, 1928, when it was discontinued because it was unprofitable.

Little Gilbert gas company :
Gilbson,
appellants,
:
:
:
7951 v. :
:
Burke Gilbson, Administrator, :
etc., et al,
appellee.

October Gilbson was the owner, as guardian, among and operator of a tenement house on the corner of [illegible] Street. Burke Gilbson died February 1, 1912, and [illegible] was appointed administrator of her estate.

On February 21, 1907, the [illegible] filed an inventory showing the estate's assets and liabilities. On the same day it received an order to sell the [illegible] at private sale, but will interest if received in the [illegible] partnership business.

On March 1, 1907, the administrator gave [illegible] Gilbson and his wife, Rose Rose in also Burke Gilbson, a bill of sale in the usual form for the undivided one-half of the [illegible] property of Ethel Gilbson, deceased, and the [illegible] as the [illegible] Gilbson. The [illegible] was expressed [illegible] $2500. At the same time a written agreement was executed between the parties, recitting that it was not yet determined [illegible] consideration of $2500 should be paid in order to [illegible] purchasers; that the bill of sale and the [illegible] should be left in escrow with the [illegible] National Bank of Chicago, Illinois, until it was determined by the [illegible] Court of Cook county how the money should be paid; and that upon the determination the bank should pay the money [illegible] the order of the court and deliver the bill of sale to the [illegible]. The bill of sale and the [illegible] were deposited in escrow in compliance by the contract. Five long and [illegible] [illegible] the [illegible] from March 1, 1907, to [illegible] 1, 1911, when it was discontinued because it was unprofitable.

Thereafter appellants filed their bill of complaint against the said administrator and against the Commercial National Bank of Rockford. It sets out the making of the two agreements and alleges the said sum of $2500 was to be left in escrow with the bank until such time as it should be determined whether or not the administrator could transfer to appellants good title to one-half interest in the "Alvea Cafe", free from encumbrance and not charged with the payment of any debt or obligation. It further alleges that on or about March 1, 1927, appellants began to work for Alva Lonn at the cafe under an oral agreement, by which they were to be paid for their services a sum commensurate with the profits until the delivery to them of a proper transfer of decedent's interest in the business; that after such transfer, they and Alva Lonn would then conduct the business as partners; that the profits arising from the business were not sufficient to pay appellants a reasonable wage for their services; that no further partnership agreement was ever made between them and Alva Lonn; that no transfer was made to them of any interest in the business; and that the partnership which existed between Alva Lonn and decedent, Esther Ellison, owed debts in excess of its assets, and in consequence thereof, the bill of sale was without consideration and void.

The bill prays that the bill of sale and contract be cancelled and declared null and void, and that the bank be ordered to pay appellants the $2500 deposited in escrow. The answer of the administrator denied that the terms of the escrow were as alleged in the bill and that appellants made the alleged oral agreement to work for Alva Lonn. It alleged that appellants purchased an interest in the business, as partners, and engaged in its operation until it was closed about the time of the filing of the bill, and that so far as appellee is informed, appellants are still in possession of the property.

An intervening petition was filed by one Hugo Larson on behalf of himself and all other creditors. It sets out substantially the same allegations as the answer and prays that the

money in escrow be paid to the administrator for the payment of the creditors of Esther Ellison, deceased. The Commercial National Bank filed no answer and was defaulted.

On the hearing, a decree was entered, finding that the administrator conveyed his intestate's interest in the business to appellants; that Alva Lonn knew of and consented to such conveyance; that thereafter appellants and Alva Lonn were partners in the conduct and operation of such business to about February 1, 1928; and that the creditors of the partnership composed of Lonn and Esther Ellison, deceased, acquiesced in and consented to such sale and are now estopped from asserting any claim against the partnership property.

The decree ordered the bank to pay the money in escrow to the administrator and directed him to keep it separate from the other funds of the estate, and to pay therefrom the creditors of the partnership which had existed between Alva Lonn and said decedent pro rata. It also directed that if any balance should remain, it should be paid to the general creditors of decedent's estate.

The chancellor was correct in holding that the contract does not provide for leaving the purchase money in escrow until it could be determined whether or not the administrator could transfer a good title free from encumbrance or obligation of creditors. The contract contained no such provision. The agreement is that the money was to be held in escrow until it could be determined how it should be disposed of, so that the purchasers would be protected. Undoubtedly, the deposit was made to protect the purchasers against the claims of creditors of the original partnership. Appellants bought and took possession of decedent's interest in the property. They operated the business in conjunction with Alva Lonn for almost a year, and the facts show that a partnership existed between them involving the property in question.

Appellants claim that the surviving partner became vested with the title to all the partnership property for the

money in as low be paid to the creditors by the bankrupt to the creditors of Esther Gillam, deceased. The Commercial Bank filed no answer and was defaulted.

On the hearing, a decree was entered, finding that the administrator conveyed his interest in the property to appellants; that also John Lee at one concerned to make the voyage; that thereafter appellants and Lee were partners in the conduct and operation of a business to April January 1, 1929; and that the creditors of the partnership, consisting of John and Esther Gillam, deceased, contracted in and concerning such sale and are now estopped from contesting any right in the partnership property.

The decree ordered the bank to pay the money in court to the administrator and directed the to keep it separate from other funds of the estate, and to pay therefrom the creditors of the partnership which had matured between Lee and said decedent pro rata. It also directed that if any balance should remain, it should be paid to the general creditors of decedent's estate.

The objection was correct in stating that the decree does not provide for leaving the insurance money in escrow until it could be determined whether or not the administrator could transfer a good title free from encumbrance or obligation of creditors. The contract contained no such provision. The agreement is that the money was to be held in escrow until it could be determined if it should be disposed of, so that the purchasers could be protected. Undoubtedly, the decree was made to protect the purchasers against the claims of creditors of the original partnership. Appellants brought the book possession of Lee and set out in the property. They procured the business to continue with Alice Lee for almost a year, and the books show that a partnership existed between them involving the property in question.

Appellants claim that the municipal partnership vested with the title to all the property, subject to the

purpose of settling the partnership affairs, and that until such settlement was made the administrator had no title or legal interest in the partnership assets. Such is the general rule. (Linn v. Downing, 216 Ill. 64.) Sec. 89 of the Administration Act (Chap. 3, Rev. Stat.) provides that such surviving partner shall have the right to continue in the possession of the effects of the partnership and proceed to settle its business. Clause D, Sec. 25, of the Uniform Partnership Act, (Chap. 106 a Rev. Stat.) provides that upon the death of a partner, his rights in specific partnership property vests in the surviving partner, but such surviving partner has no right to possess the partnership property for any but a partnership purpose. The enactment of the Uniform Partnership Act made no change in the law regarding the title to the assets of a partnership upon the death of a partner. While a surviving partner takes the exclusive legal title to the assets for the payment of partnership debts, (Miller v. Jones, 39 Ill. 54), he may waive his rights. In People v. White, 11 Ill. 342, a surviving partner waived his right to retain the property, and consented to its sale by the administrator. The personal representative of a deceased member of a firm may adjust the affairs of the partnership with the surviving partner, and in the absence of fraud or mistake, the settlement is conclusive upon the parties and all persons claiming through them. (Andrews v. Stinson, 243 Ill. 111). This case also holds that Secs. 87 to 90 of the Administration Act are cumulative and do not provide any new remedies with reference to the closing up of an estate.

There is no question of fraud or mistake before us. Appellants purchased decedent's interest in the partnership property with the knowledge and consent of the surviving partner. They took possession and operated the business in conjunction with her for almost a year after its purchase.

purpose of settling the partnership affairs, and who during such activities was made the sole misapplication had no right or legal interest in the partnership assets. [illegible] trio. (Ohm v. Lowing, 111 Ill. 64.) Sec. 30 of the Uniform Partnership Act (Chap. 2, Rev. Stat.) provides that upon surviving partner shall have the right to continue in the possession of the effects of the partnership and proceed to settle its business. Clause D, Sec. 30, of the Uniform Partnership Act, (Chap. 106 Rev. Stat.) provides that upon the death of a partner, his rights in specific partnership property vest in the surviving partner, but such surviving partner has no right to possess the partnership property for any but a partnership purpose. The enactment of the Uniform Partnership Act made no change in the law regarding the title to the assets of a partnership upon the death of a partner. While a surviving partner takes the exclusive legal title to the assets for the pay out of partnership debts, (Miller v. Jones, 39 Ill. 54), he may waive his right. In People v. White, 11 Ill. 342, a surviving partner waived his right to retain the property, and consented to its sale by the administrator. The personal representative of a deceased member of a firm may adjust the affairs of the partnership with the surviving partner, and in the absence of fraud or mistake, the settlement is conclusive upon the parties and all persons claiming through them. (Andrews v. Gibson, 34 Ill. 111). This case also holds that Secs. 27 to 30 of the Administrator's Act are cumulative and do not provide any new remedies with reference to the closing up of an estate.

There is no question of fraud or mistake here. Appellants processed decedent's interest in the partnership property with the knowledge and consent of the surviving partner. They took possession and operated the business in conjunction with her for almost a year after the decedent.

During that time they made no attempt to have the sale set aside or to place the parties in statu quo.

One who seeks to avoid a contract must restore or offer to restore what he has taken under it and place the other party in statu quo. (Rigdon v. Wollcott, 141 Ill. 649.) A party to a contract cannot retain the consideration and refuse to be bound by the contract. (Babcock v. Farwell, 245 Ill. 14.) Where a party has accepted the benefits of a contract, he is estopped to deny its validity. (Kadish v. G. C. E. L. & B. Ass'n, 151 Ill. 531.) Failure to promptly exercise a right of recission operates as a waiver of such rights. (Mound City Dist. Co. v. Consol. Adj. Co., 152 Ill. App 155).

Appellants are not in a position to complain of the decree, and no one else has challenged it. By its terms, the proceeds of the sale are to be ultimately applied in the same manner as though the sale had been made by the surviving partner. It is of no consequence that the distribution is to be made by the administrator rather than the surviving partner. Equity regards the substance rather than the form. The decree of the circuit court is affirmed.

Decree affirmed.

During that time they made no attempt to move the male out aside or to place the partner in status quo.

He who seeks to avoid a breach must restore or offer to restore what he has taken under it and place the other party in status quo. (Lindsay v. Collcott, 111 Ill. App.) A party to a contract who fraudulently induces the consideration refuses to be bound by the contract. (Schoonck v. Sewell, 24 Ill. App. 14.) Where a party has received the benefits of a contract, he is estopped to deny its validity. (Tedder v. C. C. C. & I. R. Ass'n, 181 Ill. App. 1.) Failure to promptly exercise a right of rescission operates as a waiver of such right. (Lund v. Ity Ver. Co. v. Consol. Ass'n, 1-2 Ill. App. 1-5).

Appellants argued in a petition to complain of the decree, but no one else has challenged it. By its terms, the proceeds of the sale are to be ultimately allied in the same manner as though the male had been made by the surviving partner. It is of no consequence that the distribution is to be made by the administrator rather than the surviving partner. Equity regards the substance rather than the form. The decree of the circuit court is affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 22nd day of April in the year of our Lord one thousand nine hundred and twenty-nine

Justus L. Johnson
Clerk of the Appellate Court

(53761—3M—7-27)

ABSTRACT

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8013 Agenda No. 23.

In The

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D., 1929.

PETER CROSETTO, Defendant in error,	)	
vs.	)	Error to the Circuit Court of Bureau County
JAMES CHERRY, Plaintiff in Error.	)	

OPINION by BOGGS, J.

Defendant inerror, hereinafter called plaintiff, is a barber residing in the village of Seatonville. About five o'clock on the afternoon of July 24, 1927, he was driving a Ford coupe along the highway in said village when his car collided with an automobile being operated by Roy Cherry, the son of plaintiff inerror, hereinafter called defendant. As a result of the collision, plaintiff received injuries for which this suit is instituted.

The declaration consists of six counts. The first and second counts charge general negligence. The third, fourth and sixth counts charge in effect the operation of defendant's automobile at a speed greater than was reasonable and proper, having regard to the traffic and use of the way. The fifth count charges failure on the part of the driver of defendant's car to keep to the right of the center of the beaten track. Each of said counts, in varying language, charges that the defendant purchased and maintained the automobile in question for the pleasure, enjoyment and entertainment of his family, and that Roy Cherry, the son of defendant, was a member of his said family. Each of said counts charges that plaintiff

General No. 8012 Appeals No. 62.

In The

APPELLATE COURT OF ILLINOIS

Second District

February Term, A. D., 1929.

PETER CROSETTO, Defendant in error,	
vs.	Error to the Circuit Court of Kane County.
JAMES CHERRY, Plaintiff in error.	

OPINION BY BOND, J.

Defendant in error, hereinafter called plaintiff, is a barber residing in the village of Hampshire. About five o'clock on the afternoon of July 24, 1927, he was driving a Ford coupe along the highway in said village when his car collided with an automobile being operated by Roy Cherry, the son of plaintiff in error, hereinafter called defendant. As a result of the collision, plaintiff received injuries for which this suit is instituted.

The declaration consists of six counts. The first and second counts charge general negligence. The third, fourth and sixth counts charge in effect the operation of defendant's automobile at a speed greater than was reasonable and proper, having regard to the traffic and use of the way. The fifth count charges failure on the part of the driver of defendant's car to keep to the right of the center of the beaten track. Each of said counts, in varying language, charges that the defendant purchased and maintained the automobile in question for the pleasure, enjoyment and entertainment of his family, and that Roy Cherry, the son of defendant, was a member of his said family. Each of said counts charges that plaintiff

was seriously and permanently injured as a result of the alleged negligence of the defendant.

To said declaration, the defendant filed a plea of the general issue and seven special pleas. The first special plea denies the ownership of said automobile. The second avers that the defendant did not keep said automobile for the pleasure, etc., of his family. The third avers that Roy Cherry was not a member of the defendant's family. The fourth avers that Roy Cherry "was not using any automobile of the defendant for his enjoyment and entertainment as a member of defendant's family". The fifth, sixth and seventh special pleas, in effect, set forth that Roy Cherry was not using any automobile of the defendant as the defendant's agent or servant.

A trial was had, resulting in a verdict and judgment in favor of the plaintiff for $4,500. To reverse said judgment, this writ of error is prosecuted.

The evidence discloses that the road in question had been freshly graveled, but that there was a beaten path or track where the same was traveled. On the part of the plaintiff, the evidence tends to show that he was, at the time in question, driving about fifteen miles per hour, and the defendant's son was driving some forty to forty-five miles per hour; that the driver of the defendant's car kept in the beaten track, which, at the point of said collision, was to the left of the center of the road, and that by reason thereof the collision occurred. The evidence on the part of the defendant tends to show that the plaintiff was negligent in the operation of his car at the time of said collision. Without going into a discussion of the testimony, we are satisfied that the evidence, taken as a whole, supports the finding of the jury to the effect that plaintiff was in the exercise of due care, just prior to and at the time of said collision, that the driver of the defendant's car was negligent, and that said negligence was the proximate cause of said injury.

Numerous errors have been assigned, which we will allude to briefly. It is contended that the court erred in permitting

was serious and permanent, injured as a result of the alleged negligence of the defendant.

To said declaration, the defendant filed a plea of the general issue and seven special pleas. The first special plea denies the ownership of said automobile. The second avers that the defendant did not use said automobile for his business, etc., of his family. The third avers that Roy Cherry was not a member of the defendant's family. The fourth avers that Roy Cherry was not using any automobile of the defendant for his enjoyment and entertainment as a member of defendant's family. The fifth, sixth and seventh special pleas, in effect, set forth that Roy Cherry was not using any automobile of the defendant as the defendant's agent or servant.

A trial was had, resulting in a verdict and judgment in favor of the plaintiff for $4,500. To reversal said judgment, this writ of error is prosecuted.

The evidence discloses that the road in question had been recently graveled, but that there was a broken place or track where the same was traveled. On the part of the plaintiff, the evidence tends to show that he was, at the time in question, driving about fifteen miles per hour, and the defendant's son was driving some forty to forty-five miles per hour; that the driver of the defendant's car was in the habit of the owner, which, at the point of said collision, was to the left of the center of the road, and that by reason thereof the collision occurred. The evidence on the part of the defendant tends to show that the plaintiff was negligent in the operation of his car at the time of said collision. Without going into a discussion of the testimony, we are satisfied that the evidence, taken as a whole, is ample to support the finding of the jury to the effect that the plaintiff was in the exercise of due care, just prior to and at the time of said collision, that the driver of the defendant's car was negligent, and that said negligence was the proximate cause of said injury.

Numerous errors have been assigned, which we will dispose of briefly. It is contended that the court erred in permitting

plaintiff to testify as to the speed at which defendant's car was being operated, without being qualified so to do. This objection was not made at the time, and cannot be made in this court for the first time.

It is also contended that the court erred in permitting testimony as to statements claimed to have been made by Roy Cherry in connection with said accident, on the ground that they were not a part of the res gestae. That objection was not made in apt time, and the defendant is therefore not in a position to complain.

It is also contended that the court erred in permitting plaintiff to offer testimony tending to show that the defendant's liability was covered by insurance. This point is not well taken, as defendant's counsel, by cross examination, went into the same subject and developed it to a greater extent than the plaintiff had on direct.

It is strenously insisted that the court erred in refusing to direct a verdict at the close of plaintiff's evidence and again at the close of all the evidence, on motions to that effect made by the defendant. In this connection, it is seriously contended that the record fails to show that Roy Cherry, in the operation of said automobile at the time in question, was in any way the agent or representative of his father, the defendant, and that therefore no right of recovery is shown.

The record discloses that Roy Cherry was some twenty-seven years of age; that he was employed at the zinc works at DePue, and was earning $3.28 per day, working six days a week; that he turned over to his father his checks; that his father purchased the clothing for Roy, and gave him about $5.00 a month spending money.

The undisputed evidence is to the effect that the defendant, his wife, and Roy Cherry, composed the family; that, while the defendant and his wife made a small amount as janitors for the church, practically the entire support of the family was derived from the wages of the son Roy. The car in question

plaintiff to testify as to the speed at which defendant's car was being operated, without being qualified so to do. This objection was not made at the time, and cannot be made in this court for the first time.

It is also contended that the court erred in permitting testimony as to statements claimed to have been made by the driver in connection with said accident, on the ground that the driver was not a part of the res gestae. That objection was not made at the time, and the defendant is therefore not in a position to complain.

It is also contended that the court erred in permitting plaintiff to offer testimony tending to show that the defendant's liability was covered by insurance. This point is not well taken, as defendant's counsel, by cross examination, went into the same subject and developed it to a greater extent than the plaintiff had on direct.

It is strongly urged that the court erred in permitting to direct a verdict at the close of plaintiff's evidence and again at the close of all the evidence, on motion of defendant made by the defendant. In this connection, it is contended that the record fails to show that the driver, in the operation of said automobile at the time in question, was in any way the agent or representative of the insured, the defendant, and that therefore no right of recovery is shown.

The record discloses that Roy Young had come twenty-seven years of age; that he was employed at the time with Defre, and was earning $6.50 per day, working six days a week; that he turned over to his father his earnings; that his father purchased the clothing for Roy, and gave him about $6.00 a month spending money.

The uncontradicted evidence is to the effect that the defendant, his wife, and Roy Young, composed the family home, while the defendant and his wife made a small contribution for the support, practically the entire support of the family was derived from the wages of the son Roy. The contribution

was purchased and paid for by trading in a former car, and by the earnings of Roy. The father testified: "I bought this car for my son's use and my wife's use. My son would use it most generally on Sunday or Saturday night. If the roads were bad, he would take his own car. Never gave him instructions not to use the car.* * * The key (of the Buick coach) was hanging up, going in the kitchen there, and anybody that wants the car can take it off, but Roy always asked me. If the roads aren't bad, he asks for it right along. I always let him have it. He goes out on his own purposes with the car, just like he did on this trip. If he asks me for the car, he has got it for his own purposes, to take the boys and girls out riding, and he got it. The only time he ever used it when he didn't ask for it was when he took my wife up to the church, and I didn't know where he went. I heard my wife talking about going up to the church, and she asked Roy to take her. I didn't give him any instructions about coming back with the car, and I didn't tell him any particular time to come back with the car."

On the day in question, the defendant knew that his son was going to take his mother to the church, for he testified he heard them talking, but he also testified that he did not know his son was going to use the car for any other purpose. Mrs. Cherry testified that Roy asked her for the car after he took her to church, and she told him not to take it. Roy testified at one time that he had the permission of his father to use the car that day, and at another that he did not. The record, however, clearly discloses that the car in question was maintained for the family use, for pleasure driving, etc. Under the decisions of the supreme and appellate courts, the car in question must be held to have been purchased and maintained by the defendant for the use, pleasure and entertainment of his family; that Roy Cherry was a member of that family; that on the day in question he was driving said car, if not with the express, with the implied authority of the defendant; and that in so doing he was carrying into effect one of the purposes for which said car

was increased and paid for by trading in a former car, and by the earnings of Roy. The father testified: "I bought this car for my son's use and my wife's use. My son would not be most reasonable on Sunday or Saturday night. If the roads were bad, he would take his own car. Never gave his permission to use the car." The key (of the Buick sedan) was hanging up, inside in the kitchen there, and anybody and would take our own car out of, they always asked me. If the road doesn't need, we use for it alone along. I always let him have it. He goes out on his own purposes with the car, just like he did on this trip. He asked me for the car, he has got it for his own purposes, to take the boys and girls on trips, and he got it. The only time he ever used it when he didn't ask for it was when he took my wife to the church, and I didn't know where he went. Those are the talking about going up to the cemetery, and he would ask for to use her. I didn't give him any instructions about taking care with the car, and I didn't tell him any particular time to come home with the car.

On the day in question, the defendant came that day and was going to take his mother to the church, but he testified he heard them talking, but he also testified that he did not know his son was going to use the car for any other purpose. Mrs. Cherry testified that he asked her if he could use the car to go to church, and she told him not to take it. He testified at one time that he had the permission of his father to use the car that day, and at another time that he did not. The record, however, clearly discloses that the car in question was maintained for the family use, for pleasure driving, etc. Under the statutes of the supreme court of Illinois, the car in question must be held to have been purchased and maintained for the family use, pleasure and convenience of the family; and Roy Cherry was a member of said family; that he was, on the occasion in question he was driving said car, at least with the consent, with the implied authority of the defendant; and that he at the time was carrying into effect one of the purposes for which the

was maintained. The defendant would, therefore, be liable for the negligence of his said son, if shown, in the operation of said car. Graham v. Page, 300 Ill. 40-44; Gates v. Mader, 316 Ill. 313; Cloyes v. Plaatje, 231 App. 183; Toms v. Kitterer, 237 App. 185; Hinkle v. Gall, 238 App. 512; Beesley v. Goldstein, 239 App. 221. The mere fact that the defendant's son has reached his majority will not relieve the defendant of his responsibility. Beesley v. Goldstein, supra.

Counsel for the defendant cite and rely on the case of Arkin v. Page, supra. That case was decided by a divided court, three of the judges dissenting, and the facts are somewhat different from the facts in this case. The defendant's son in the Arkin case took his father's car to drive to a college to see about matriculating, and in that connection, he expected to pay his own tuition. The father did not know that he was using the car. The court held the father not liable. Here the defendant's son was using the car for one of the purposes for which the defendant testified it was purchased. Then, too, it should be observed that the supreme court in the later cases of Graham v. Page, supra, and Gates v. Mader, supra, followed the rule making the defendant liable where a car has been purchased for family use, entertainment and pleasure, and is being driven by a member of the family, as here.

In Graham v. Page, supra, the court at page 43 says: "The question * * * is presented, whether the law imposes liability on the defendant for damages sustained by the plaintiff. This question, under somewhat varying facts, has been the subject of adjudication in many of our states, and the decisions are not in harmony. Those holding the owner of an automobile liable for injuries caused by the negligent driving of the car by the child of the owner, base the liability on the ground that the child was a the servant or agent of the owner, and have sustained liability where the car was purchased and kept solely for the pleasure of the owner's family and a member of the family was driving it for hiw own pleasure when the injury occurred. The courts taking that

view say the car was being used by authority of the owner for the purpose for which it was procured and kept, namely, the comfort, pleasure and entertainment of the family, which it is the duty of the father to provide for his family. Many of the cases holding that view will be found in the dissenting opinion in Arkin v. Page, supra, and need not be again cited."

At page 44 the court further says: "The weight of authority supports the liability of the owner of a car which is kept for family use and pleasure where an injury is negligently caused by it while being driven by one of his children by his permission, and the reasoning of those cases seems sound and more in harmony with the principles of justice. We agree with the Supreme Court of Tennessee that where a father provides his family with an automobile for their pleasure, comfort and entertainment, 'the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained.' (King v. Smythe, 140 Tenn. 217)"

In Beesley v. Goldstein, supra, the court sustained a judgment against the defendant, where his daughter, twenty years of age and living with her father, was driving the car on her own initiative, accompanied by her fiance and his sister. This without the actual knowledge or consent of her father but with his general permission.

The court did not err in refusing to direct a verdict.

It is further contended that the court erred in the giving of the second and fourth instructions given on behalf of plaintiff, and in refusing the sixteenth and seventeenth instructions offered by defendant.

Said second instruction purports to advise the jury with reference to the amount of proof necessary to support the plaintiff's cause of action. The instruction is not entirely correct in the rule announced, but the giving of said instruction would not warrant a reversal of said judgment.

It is insisted that the fourth instruction contains elements

view say the car was being used by authority of the owner for the purpose for which it was provided and is, namely, the convenience, pleasure and entertainment of the family, which it is the duty of the father to provide for his family. Then at the same moment their view will be found in the dissenting opinion in Kline v. Ibsen, supra, and need not be again stated.

It goes as the court further says: "The relation of authority supports the liability of the owner of a car which is kept for family use and pleasure where an injury is negligently caused by it while being driven by one of his children or with his permission, and the decisions of those cases seem to be not in harmony with the principles of justice. In Henry v. Dunn, the Supreme Court of Tennessee that where a father provides his family with an automobile for their pleasure, conduct and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation, because only in doing so, as a general rule, can substantial justice be attained." (Kline v. Ibsen, 140 Tenn. 217)

In Beasley v. Killebrew, supra, the court approved a judgment against the defendant, where his daughter, twenty years of age and living with her father, was driving the car on her own initiative, accompanied by two friends and a minor, without the express knowledge or consent of her father and with his general acquiescence.

The court did not err in refusing to direct a verdict.

It is further contended that the court erred in giving of the second and fourth instructions given on behalf of plaintiff, and in refusing the sixth and seventeenth instructions asked by defendant.

Said second instruction purports to advise the jury with reference to the amount of actual damages to compensate the plaintiff's cause of action. The instruction is not erroneous in the rule announced, but the giving of said instruction is not ground for a reversal of said judgment.

It is insisted that the trial court erred in not sustaining

as a basis for damages, not contained in the evidence. In this connection it is insisted that there was no proof of permanent disability, or that any money was necessarily expended by the plaintiff, and no evidence of any future bodily pain or suffering or inability to transact business.

Plaintiff testified: "My hand was cut clean across from here (indicating) clean around in there. You could see inside, right there, right open, and clean around in there, and cut the cords clean off of my fingers and left my hand injured right along, and I couldn't move it; my hand is perfectly dead at the present time and no feeling in it. Have a cut here down to the bone (indicating) and it left one of the blood vessels stick out. Got a piece of glass under this knuckle, which can't bend very good now. The doctor says I will never bend it without its hurting, all of my life. A piece of glass went right into the knuckle of the finger, straight in."

It cannot be said there is no evidence of permanent injury. With reference to future pain and suffering, the plaintiff testified that every time there was a change of weather, he suffered from said injury. The declaration avers that the plaintiff expended a large amount of money in and about attempting to be cured, whereas the evidence is to the effect that he incurred a liability of $100. for physicians' bills and $50. for hospital bills, but there was no proof that these bills had been paid. To that extent, the objection made to this instruction is well taken.

The refused instructions sixteen and seventeen, offered on behalf of the defendant, so far as the same stated correct principles of law, were fully covered by the instructions given. There was no reversible error in the ruling of the court on the instructions.

Lastly, it is contended that the verdict is excessive. The testimony is to the effect that plaintiff was earning $30. per week in his business as a barber; that since his injury he had not been able to use his right arm or to work at his trade. From the character of said injuries as disclosed by the undisputed

as a basis for damages, not a minded in his evidence. In this connection it is indicated that there was no proof of plaintiff's disability, or that any money was necessarily expended by the plaintiff, and no evidence of any future medical care or expense or inability to transact business.

Plaintiff testified: "My head has got sore since I came here (indicating) seven months ago. I can walk one block, right there, right here, and sit a minute or more, and my cords claim off if I try to go and lift my feet (indicating) along, and I couldn't make it if I had to walk a long ways. The present time and no testing in it. There I was then in my bond (indicating) and it left me of the blood vessels all in me. Get a piece of glass under the cords, which don't feel very good now. The doctor says I will never feel it always. Its nothing all of my life. I have to have help when I go to bed and the time, everyone is."

It cannot be said that the evidence of permanent injury. With reference to pain and suffering, the plaintiff testified that every time there was a change of weather, he suffered from self injury. The defendants argue that the plaintiff expended a large amount of money in medical attention, and increase the evidence in the effort to show the amount in excess of $100. For petitioners' claim was $5. The medical bills, and there was no proof that these bills were paid. In the minor, the objection made to this instruction is well taken.

The refused instructions clearly and fairly set forth, on behalf of the defendant, the law on the issue of medical attention, principles of law, were fully covered in the instructions given. There was no reversible error in the ruling of the court on the instructions.

Lastly, it is contended that the verdict is excessive. The testimony is to the effect that immediately the carrier was over week in his business as a jeweler; that upon the injury he had not been able to use his right arm to go to work his wheel. From the character of said injuries as disclosed in the testimony

evidence, the jury would be warranted in finding that plaintiff had been permanently injured. We are not prepared to say that the verdict is so excessive as to indicate that the jury were governed by prejudice and passion. That being the state of the record, we would not be warranted in reversing the judgment on the ground that it was excessive.

In view of the fact that the declaration charges the expenditure of money in an attempt to be cured, and the proof only showing that a liability had been incurred to the extent of $150., the verdict to that extent would be excessive. Hinton v. Muhlmann, 201 App. 177-179. If the plaintiff will remit $150., reducing the judgment to $4,350., within fifteen days of notice of the filing of this opinion, the judgment will be affirmed; otherwise the same will be reversed and the cause remanded.

Affirmed with remittitur: otherwise reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of June in the year of our Lord one thousand nine hundred and twenty-nine.

Justus L. Johnson
Clerk of the Appellate Court

(53761—3M—7-27)

ABSTRACT

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On APR 29 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8018 Agenda No. 26.

A. H. Mammen,

appellant,

vs.

H. A. Millard, H. E. Mammen,
R. H. George, R. E. Gordon and
F. D. McNertney,

appellees,

Appeal from the Circuit Court
of Woodford County, Illinois.

OPINION by BOGGS, J.

An action in trespass was instituted by appellant against appellees in the circuit court of Woodford County. The first count of the declaration charges appellees with falsely causing appellant's imprisonment in the Elgin State Hospital for the Insane. The second count charges false imprisonment as the result of a conspiracy on the part of appellees.

Demurrers filed to said declaration being overruled a plea of the general issue and a special plea was filed by defendants, Gordon and Millard, setting forth in effect that on August 16, 1926, a petition was filed by the defendant, R. H. George, in the County Court of said County; that a writ was regularly served on appellant on said day; that said petition alleged that appellant was insane and prayed that his sanity be inquired into as provided by statute; that thereupon the Honorable W. H. Foster, judge of said county court, entered an order appointing a commission consisting of the defendants Gordon and McNertney, duly licensed physicians, etc.; that said defendants examined appellant as provided by statute, and made report to said county court, finding that appellant was insane; that thereafter, on August 18, said cause coming on to be heard on said report before the said judge "at a time when said court was regularly convened and then and there had jurisdiction of the subject matter and of the person

General No. 8018

Appeal No. 46.

A. H. Mammen,

appellant,

vs.

H. A. Millard, H. A. Mammen,

R. H. George, R. E. Gordon and

F. D. McNerney,

appellees.

Appeal from the Circuit Court of Bedford County, Illinois.

OPINION OF JUSTICE, E.

An action in trespass was instituted by appellant against appellees in the circuit court of Bedford County. The first count of the declaration charges appellees with falsely causing appellant's imprisonment in the Elgin State Hospital for the Insane. The second count charges false imprisonment as the result of a conspiracy on the part of appellees.

Demurrers filed to said declaration being overruled a plea of the general issue and a special plea was filed by defendants, Gordon and Millard, setting forth in effect that on August 16, 1926, a petition was filed by the defendant, R. H. George, in the County Court of said County; that a writ was regularly issued on appellant on said day; that said petition alleged that appellant was insane and proved that his sanity be inquired into as provided by statute; that thereupon the honorable R. H. George, judge of said county court, entered an order appointing a commission consisting of the defendants Gordon and McNerney, duly licensed physicians, etc.; that said defendants examined appellant as provided by statute, and made report to said County Court, finding that appellant was insane; that therefore, on August 16, said cause coming on to be heard on said report before the said judge "at a time when said court was regularly convened and then and there had jurisdiction of the subject matter and of the person

of the said A. H. Mammen, and that upon a hearing of said question and on consideration of the report so filed * * * * and of the sworn testimony of witnesses produced in said court * * * touching the sanity of the said A. H. Mammen, * * * W. H. Foster, judge as aforesaid, * * * then and there having jurisdiction of the parties and the subject matter, did then and there enter a judgment or order upon the records of the county court of Woodford county in the State of Illinois, then and there adjudging and finding that the said A. H. Mammen was then and there an insane person." Said plea further averred that appellant was committed to the Elgin State Hospital for the Insane, "that the judgment, order, decree and finding so made by the said W. H. Foster, judge of the said county court in the county of Woodford and the state of Illinois, still remains and now is in full force and effect, and that said judgment was duly and regularly entered as of record on the date aforesaid; that no appeal has ever been prayed nor has any writ of error ever been allowed or prosecuted against the finding, order, judgment and decree so entered as aforesaid."

A plea of the general issue and a special plea was joined in by appellees George, McNertney and Mammen. Said special plea in effect sets forth that on the 16th day of August, 1926, and prior thereto, appellant was insane; that by reason thereof a petition was filed in said county court, alleging as in the other plea the issuance and service of said writ; that a commission was appointed and a hearing was had as provided by statute; that on said hearing appellant was found insane and was committed to said hospital. Said plea further avers that appellees Millard, George, Gordon and McNertney were on the 16th day of Augst, 1926, and prior thereto and subsequent thereto, duly licensed and qualified physicians under the laws of the state of Illinois, and were practicing their professions as such physicians at said time within the county of Woodford and state of Illinois, and that the commission appointed by said court was a valid commission and in accordance with the statutes of the state of Illinois, etc.

of the said A. T. Hamer, and that upon a hearing of said petition and on consideration of the report so filed * * * and on the sworn testimony of witnesses produced in said court * * * touching the sanity of the said A. H. Hammon, * * * W. E. Foster, Judge as aforesaid, * * * then and there having jurisdiction of the parties and the subject matter, did then and there enter a judgment or order upon the records of said county court of Bedford County in the State of Illinois, then and there adjudging and finding that the said A. H. Hammon was then and there an insane person." said plea further averred that said was committed to the Alpha State Hospital for the insane, "that the judgment, order, decree and finding so made by the said W. E. Foster, Judge of the said county court in the county of Bedford and the state of Illinois, still remains and now is in full force and effect, and that said judgment was duly and regularly entered as of record on the date aforesaid; that no appeal was ever been prayed nor had and that or error ever been allowed or prosecuted against the finding, order, judgment and decree so entered as aforesaid."

A plea of the general issue and a special plea were joined in by appellees George, Gordonby and Hammon. Said special plea in effect set forth that on the 16th day of August, 1926, and prior thereto, appellant was insane; that by reason thereof a petition was filed in said county court, alleging as in the other plea the insanence and service of said writ; that a commission was appointed and a hearing was had as provided by statute; that on said hearing appellant was found insane and committed to said hospital. Said plea further stated that appellees Hilliard, George, Gordon and Gordonby were on the 16th day of May, 1926, and prior thereto and at present thereto, duly licensed and qualified physicians under the laws of the State of Illinois, and were practicing their professions as such physicians at said time within the county of Bedford and state of Illinois, and that the commission appointed in said court was a valid commission and in accordance with the statutes of the state of Illinois, etc.

To said special pleas appellant filed replications, admitting that the proceedings set forth in said petition had been had, but averring that appellant on the date of said imprisonment was not insane; that no valid judgment was ever rendered by a court of competent jurisdiction; that the initial petition filed in the alleged insanity proceedings was not filed in said county court but it was filed with the clerk of said court in the city hall of El Paso; that said petition was on information and belief and did not state that appellant was insane; that said so-called inquest in lunacy and all the proceedings in regard thereto, including the order of said county judge, were held in the city hall of the city of El Paso, Illinois; that the said so-called inquest and all proceedings in regard thereto were not held at a place where the county court of Woodford county, Illinois, was authorized by law to hold an inquest in lunacy; that said so-called lunacy inquest was not held in court, was not held in chambers, and was not held at the home of the appellant; and that said proceeding was void for want of jurisdiction, etc.

A general demurrer filed to said replications was sustained by the court. Appellant elected to abide his replications, and judgment was rendered in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

Appellant did not demur to said special pleas. By his replications, he admitted that said pleas set forth a record which, if true, would be a complete answer to his declaration. He seeks to avoid the conclusive effect of the proceedings set forth in said pleas, by undertaking to show that the petition was not properly filed; that the matters and things therein set forth were on information and belief; that said commission appointed was not a proper commission; and that the proceedings were held in the city hall at El Paso instead of in one of the places provided by statute, etc. In other words, appellant, by collateral attack, seeks to show that said record so pleaded is not what it purports to be, and is not a valid and binding record.

Appellant concedes that, as to many of the matters over which county courts have jurisdiction, such jurisdiction is not limited or special, but general, but states that "county courts in lunacy inquests are in the exercise of special statutory powers, and are to

To this effect plaintiff filed certificates, stipulating that the proceedings set forth in said petition had been had, but averring that appellant on the date of said judgment was not insane; that no valid judgment was ever rendered in a court of competent jurisdiction; that the initial petition filed in the alleged insanity proceedings was not filed in said county hence but it was filed with the clerk of said court in the city hall of El Paso; that said petition was an instrument and pleading that did not state that appellant was insane, but sought to deprive him of liberty and all the property in Texas, which, in violation of order of said county judge, were sold in the city hall of the city of El Paso, Illinois; that the said so-called inquest and all proceedings in regard thereto were not held at the place where the county court of Yoakum county, Illinois, was authorized by law to hold an inquest to lunacy; that said so-called inquest was not held in court, was not held in chambers, and was not held at the home of the appellant; and that said proceedings was void for want of publication, etc.

A general demurrer, filed by many appellees, was sustained by the court. Appellants failed to amend his pleadings, and judgment was rendered in favor of appellees and for costs. To reverse said judgment, this appeal is prosecuted.

Appellant did not desire to sell special place. In his testimony, he testified that said place at Lincoln Park Place, Illinois, would be a doubtful investment to his daughter. He sought to avoid the jurisdiction effect of the proceedings and claim to hold place, by undertaking to show that the petition was not properly filed; that the matters and things therein contained were not information and belief; that said instrument was signed as a verified commission; and that the proceedings were held in the city hall in El Paso instead of in and at the place provided by statute, etc. In other words, appellant, by collateral attack, seeks to show that said record so placed in evidence is purport to be, and is not valid and binding record.

Appellant concedes that, as a rule, if the petition over which county courts have jurisdiction, was jurisdictional, was not fraud or special, but general, but states that "insane persons in Illinois are in the exercise of general citizenship, and are

treated as courts of limited or special jurisdiction, and that nothing will be presumed to be within their jurisdiction which does not distinctly appear to be so."

While county courts are courts of limited jurisdiction, they are not courts of inferior jurisdiction. When adjudicating upon a class of questions over which they have general jurisdiction, as liberal intendments will be indulged in their favor as will be extended to the proceedings of circuit courts. Fecht v. Freeman, 251 Ill. 84-97; Anderson v. Gray, 134 Ill. 550-554; Hoit v. Snodgrass, 315 Ill. 548-551; Moats v. Moore, 199 App. 270-274.

Jurisdiction of the subject matter means jurisdiction of the class of cases to which the particular case belongs, and it is always conferred by law. Roy v. Upton, 234 App. 53-55, Ochman v. Small, 282 Ill. 360-363.

Where a court has jurisdiction of the subject matter and the parties, its judgments or decrees cannot be questioned collaterally. Spring v. Kane, 86 Ill. 580; Sheahan v. Madigan, 275 Ill. 372-377; Hoit v. Snodgraas, supra, 551, Bishop v. Walsh, 145 App. 491-497.

"Jurisdiction over the persons of insane persons, not charged with crime, is vested in the county courts." Cahills Stat., chap. 85, sec. 13. County courts are courts of record, and are created by the constitution (Art. 6, paragraphs 1 and 18.) Under the statutes of this state, the jurisdiction of county courts in insanity proceedings is original and exclusive, except in criminal cases.

The county court of Woodford county therefore had jurisdiction of the subject matter of said proceedings. The pleas set forth the filing of a petition, the issuance of a writ and service thereof, and all the statutory steps necessary to be followed in a proceeding of this character. Under the above authorities, the judgment of a county court in a proceeding of this character cannot be collaterally attacked. In Hoit v. Snodgrass, supra, the court at page 551 says:

"Where the court has jurisdiction of the subject matter and

treated as courts of limited or special jurisdiction, and that no matter will be presumed to be within their jurisdiction which does not distinctly appear to be so."

While county courts are courts of limited jurisdiction, they are not courts of inferior jurisdiction. When adjudicating upon a class of questions over which they have general jurisdiction, as in probate judgments will be indulged in their favor as well as attorney to the proceedings of circuit courts. Pooh v. Freeman, 181 Ill. 84-91; Anderson v. Gray, 164 Ill. 590-594; Holt v. Snodgrass, 210 Ill. 528-531; Moats v. Moore, 159 App. 270-274.

Jurisdiction of the subject matter means jurisdiction of the class of cases to which the particular case belongs, and it is always conferred by law. Loy v. Upton, 224 App. 55-58, Oberman v. Ball, 252 Ill. 560-562.

Where a court has jurisdiction of the subject matter and the parties, its judgments or decrees cannot be questioned collaterally. Spring v. Kane, 86 Ill. 550; Shepard v. Madigan, 278 Ill. 572-577; Holt v. Snodgrass, supra, 531, Bromby v. Tatum, 141 App. 427-427.

"Jurisdiction over the persons of insane persons, not charged with crime, is vested in the county courts." Smith's Stat., Chap. 86, sec. 16. County courts are courts of record, and are created by the constitution (Art. 6, paragraphs 1 and 16.) Under the statutes of this state, the jurisdiction of county courts in lunacy proceedings is original and exclusive, except in criminal cases.

The county court of Woodford county therefore had jurisdiction of the subject matter of said proceedings. The place set forth the filing of a petition, the issuance of a writ and serving thereof, and all the statutory steps necessary to be followed in a proceeding of this character. Under the above authorities, the judgment of a county court in a proceeding of this character cannot be collaterally attacked. In Holt v. Snodgrass, supra, the court at page 531 says:

"Where the court has jurisdiction of the subject matter and

the parties its judgment or decree cannot be questioned collaterally, no matter how erroneous it may be. This rule applies in all its force to the county court, which has general jurisdiction of conservatorship proceedings, and its judgments and decrees are not subject to review by the circuit court collaterally for error. (Sheahan v. Madigan, 275 Ill. 372. * * * Having a right to decide every question that occurred in the proceedings, the errors and irregularities of the court rendering judgment, if any exist, must be corrected in that court by proper proceedings or by a court of review regularly exercising its appellate jurisdiction. * * * When the general character of a judgment is such that its subject matter falls within the general jurisdiction of the court that enters it, a collateral attack cannot be made thereon even though the pleadings may be defective and subject to demurrer. Christianson v. King County, 239 U.S. 356, 36 Sup. Ct. 114; Jarrell v. Laurel Coal and Land Co., 75 W. Va. 752, L.R.A. 1916 E., 312; Tube City Mining & Milling Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203; Altman v. School District, 35 Ore. 85, 56 Pac. 291; In re James' Estate, 99 Cal. 374, 33 Pac. 1122; Trumble v. Williams, 18 Neb. 144, 24 N.W. 716. * * * Grant that the petition should have contained a formal prayer to declara Smith insane, the action of the county court in treating the petition as sufficient and rendering its judgment appointing the conservator can be nothing more than error."

County courts have the right to determine their jurisdiction. Fecht. v. Freeman, supra, 98; Anderson v. Gray, supra.

Counsel for appellant, while admitting the general rule to be as set forth, insist that, in insanity proceedings, those rules do not obtain. In Moats v. Moore, supra, the court in discussing a question of this character at page 274 says:

"Appellant seeks to reverse this order of court, first, because the appellant was never legally declared insane, and that no basis ever existed for the appointment of a conservator. It is claimed by counsel for appellant that, at the time she was adjudged insane,

the petition is judgment or decree cannot be questioned collaterally, no matter how erroneous it may be. This rule applies in all its force to this county court, which has general jurisdiction of conservatorship proceedings, and its judgments and decrees are not subject to review by the circuit court collaterally in such. [illegible] v. Madigan, 275 Ill. 272. " " " Having a right to [illegible] that occurred in the proceedings, the errors and irregularities of the court rendering judgment, if any exist, must be corrected in that court by proper proceedings or by a court of review regularly constituted, the appellate jurisdiction. " " " When the general character of a judgment is such that its subject matter falls within the general jurisdiction of the court that enters it, a collateral attack cannot be made upon it even though the pleadings may be defective and subject to demurrer. Chmielniakson v. Ring County, 293 Ill. 156, 8 N.E. 1p. 6. 1149; Lorrill v. Lawrel Coal and Land Co., 75 F. V. 758, 1 N.A. Lab R., 8M; Tube City Mining & Milling Co. v. Otterson, 16 Ariz. 303, 146 Pac. 308; Altman v. School District, 30 Ore. 85, 55 Pac. 2M; In re Kemmel Estate, 99 Cal. 574, 32 Pac. 1125; Trumble v. Williams, 18 Neb. 1M, 24 N.W. 716. " " " Grant that the petition should have contained a formal [illegible] to declare Smith insane, the action of the county court in treating the petition as sufficient and rendering its judgment appointing the conservator can be nothing more than error."

County courts have the right to determine their jurisdiction. Peart. v. Freeman, supra, 98; Anderson v. Gray, supra.

Counsel for appellant, while admitting the general rule to be as set forth, insist that, in insanity proceedings, these rules do not obtain. In Meets v. Moore, supra, the court in discussing a decree of this character at page 574 says:

"Appellant seeks to reverse the order of court, first, because the appellant was never legally confined insane, and that no basis ever existed for the appointment of a conservator. It is claimed by counsel for appellant that, at the time the petition was filed,

that no notice was served on her, and that she was not present at the time of the adjudication. While the county court of Jefferson county was a court of limited jurisdiction, it was not a court of inferior jurisdiction, and was invested by the legislature with jurisdiction in this class of cases, and as liberal intendments will be made in favor of its jurisdiction in this class of cases as will be extended to proceedings in the circuit court. (Fecht v. Freeman, 251 Ill. 84.) * * * Where the record of a judgment or decree is relied on in a collateral proceeding, jurisdiction must be presumed in favor of a court of general jurisdiction, although it is not alleged and does not appear in the record.' Horn v. Metzger, 234 Ill. 240. We are of the opinion that it must be conclusively presumed that the county court, being one of general jurisdiction in this class of cases, must be presumed to have had jurisdiction both of the person and the subject-matter."

Even if it be conceded that appellant had the right, by his replications, to question the sufficiency of said record, it is a serious question if the matters set forth in said replications would be sufficient to impeach the same. The point most strenuously urged in this connection is that said proceedings were held in the city hall of El Paso. The statute provided that "such proceedings may be in open court, or in chambers, or at the home of the person alleged to be insane, at the discretion of the court." Appellant cites Bouvier's Law Dictionary, Vol. 1, as to what constitutes "in chambers", as follows: "Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be in chambers." Under that definition, even though it be conceded that said hearing before the commissioners and county judge was at the city hall in El Paso, it would be a hearing in chambers.

Another point urged is that said petition was on information and belief, and did not aver that appellant was insane. There is nothing in the pleas to show that the petition was on information and belief, and it does aver that appellant was insane.

If it is the contention of appellant that the procedure or said record would disclose that the court did not have jurisdiction to enter the order committing appellant, that question should have been raised by a replication of nul tiel record. This being a civil trespass, the attack ought to be made on the proceedings set forth in said plea is a collateral attack. The court therefore did not err in sustaining the demurrer to said replications and in rendering judgment thereon.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of April in the year of our Lord one thousand nine hundred and twenty-nine

Justus L. Johnson
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Dan Saltsman,

appellee,

vs.

The Home Insurance Company
New York, a corporation,

Appeal from the Circuit
of La Salle County.

JONES, P. J.

Appellee, Dan Saltsman, instituted an action against appellant, Home Insurance Company, New York on a fire insurance policy and recovered a judgment for $437.30 and costs. The cause comes here by appeal.

The declaration consisted of one county. Defendant filed a plea of the general issue and special pleas. However, the special pleas were waived by a stipulation that the defendant might under the general issue introduce in defense all relevant matters of evidence which could be offered under any special plea, and that plaintiff upon the trial to meet such defense might introduce all evidence with the same force and effect as though the same had been specially pleaded.

Appellee had suffered a fire loss under a policy issued by the defendant company previous to the issuing of the policy in this case. The property destroyed by that fire consisted of household goods and effects. After the lost was adjusted, appellee made an application for a new fire and lightning policy, and also for a windstorm policy. The full premium for both policies was $61.63, for which appellee gave his note dated April 21, 1924, payable October 1, 1924. There was due appellee from the company $32.44 as a return premium on the old policy and this amount was apportioned pro rata on the premiums of the new policies and endorsed on the note as a credit. The amount of the return premium credites on the new fire policy was $21.19 and upon the windstorm policy $11.25, leaving $29.19 as the principal of the note.

7993

Dan Saltzman,

appellee,

vs.

The Home Insurance Company
New York, a corporation,

JONES, P. J.

Appellee, Dan Saltzman, instituted an action against appellant, Home Insurance Company, New York on a fire insurance policy and recovered a judgment for $[illegible].50 and costs. The cause comes here by appeal.

The declaration consists of one count. Defendant filed a plea of the general issue and special plea. However, the special plea were waived by a stipulation that the defendant might under the general issue introduce in defense all relevant matters of evidence which could be offered under any special plea, and that plaintiff upon the trial to meet such defense might introduce all evidence with the same force and effect as though the same had been specially pleaded.

Appellee had suffered a fire loss under a policy issued by the defendant company previous to the issuing of the policy in this case. The property destroyed by that fire consisted of household goods and effects. After the loss was adjusted, appellee took an application for a new fire and lightning policy, and also for a windstorm policy. The full premium for both policies was $[illegible].50, for which appellee gave his note dated April 21, 1924, payable October 1, 1924. There was due appellee from the company $[illegible].44 as a return premium on the old policy and this amount was appropriated pro rata on the premiums of the new policies and endorsed on the note as a credit. The amount of the return premium credited on the new fire policy was $21.15 and upon the windstorm policy $11.[illegible], leaving $[illegible] as the principal of the note.

The property was destroyed by fire August 25, 1925 and notice thereof was given to the company as provided by the policy. The insurance company denied liability and to this suit on the policy interposes two defenses: (1) that the premium note was due and unpaid at the time of the loss, and (2) that there was a chattel mortgage on the property when it was insured, which fact appellee concealed and misrepresented. When plaintiff notified defendant of his loss under the policy, he sent with the notice a draft for $2..19, the unpaid balance of the face of the note heretofore mentioned. Defendant's agents returned the draft to plaintiff notifying him that his offer of payment of the note was refused; that the policies became suspended and inoperative on October 1, 1924, as the result of his failure to pay such note when due, and that the Company was under no liability for any loss or damage which may have occurred to the property described in the policies or which might occur thereafter.

The application for the policy, and the policy itself provide that if any promissory note or obligation given for the whole or any portion of the premium for the policy shall not be paid promptly when due, then such policy shall be suspended, inoperative, and of no force and effect until such promissory note is paid, and the company shall not be liable for any loss or damage while such note or obligation given remains past due and unpaid.

At the time of the fire, the premium note was past due and unpaid. Defendant claims that therefore the policy became suspended from the date the note matured until it was paid. It is the contention of appellee that the company waived the payment of the premium note at its maturity and consented to an extension of the time for payment until after threshing time in 1925. In support of this contention, appellee testified that he met Meagher, defendant's agent, who wrote the policy, in the early part of August, 1924, at Seneca, Illinois; that they had a conversation about the payment of the note; that he

The property was destroyed by fire August 5, 1929 and notice thereof was given to the company as provided by the policy. The insurance company denied liability and to this suit on the policy interposes two defenses: (1) that the premium note was not unpaid at the time of the loss, and (2) that there was a material mortgage on the property when it was insured, which fact was concealed and misrepresented. Upon receiving notice of the loss under the policy, he sent with the notice a draft for $1.10, the unpaid balance of the fee of the fire insurance inspector. Defendant's agents returned the draft to plaintiff, stating that his offer of payment of the note was refused until the policyholds because suspended and inoperative on October 1, 1924, at the month of his failure to pay such note when due, and that the company was under no liability for any loss or damage which may have occurred to the property described in the policies or which might occur thereafter.

The application for the policy, and the policy itself provide that if any promissory note or obligation given for the whole or any portion of the premium for the policy shall not be paid promptly when due, then such policy shall be suspended, inoperative, and of no force and effect until such promissory note is paid, and the company shall not be liable for any loss or damage while such note or obligation given remains past due and unpaid.

At the time of the fire, the premium note was past due and unpaid. Defendant claims that it rescinds the policy because suspended from the date the note matured until it was paid. It is the contention of appellee that the company waived the payment of the premium note at its maturity and consented to an extension of time for payment until after threatening time in 1929. In support of this contention, appellee testified that he met Mr. [illegible], defendant's agent, and [illegible] the policy, in the early part of March, 1924, at Ennis, Illinois; that they had a conversation about the payment of the note; that he

told Meagher he would pay it just as soon as he got through threshing; and that Meagher replied it would be all right with him and with the Company, if it was paid at that time. Meagher admitted having had a conversation with appellee on this subject but denied telling appellee it would be all right to pay the note after threshing time.

The provisions of an insurance policy for its suspension or forfeiture are inserted for the benefit of the company and may be waived. Provisions regarding the non-payment of a premium, premium note, or installment note are generally of this character and may be waived. (26 C. J. Fire Ins. Secs. 350-352; Phoenix Ins. Co. v. Hart, 149 Ill. 513¾)

When the fire occurred, the earned premium was less than $29.19 which had been credited on the note, that is to say, the cost of carrying the insurance from the date of the policy to the time of the fire was less than the credit which was endorsed on the premium note. It is now urged by appellee that no suspension of the policy could be had until such credit had been exhausted. He invokes the rule that where an insurance company attempts to cancel a policy, it must return the unearned premium before it can cancel the policy and that there can be no cancellation of the policy until the unearned premium has been returned to the policy holder. (Peoria M. & F. Ins. Co. v. Botto, 47 Ill. 516; Etna Ins. Co. v. McGuire, 51 id. 342; Williamson v. Warfield, Pratt, Howell Co. 136 id. 168; Hamsell-Elcock v. Frank Wayne Ins. Co. 177 id. 500; Hartfore Ins. Co. v. Tews, 132 id. 321.) Defendant cannot at one and the same time treat the policy as alive for the purpose of earning premium, and dead for the purpose of avodding a loss. ~~(Young v. Union~~ (Young v. Union Life Ins. Co. 202 Ill. App. 321.) While it would indeed be harsh to permit an insurance company to suspend the policy while it has unearned premiums in its hands, still it is not necessary to decide this case on that ground. The question of an agreement to extend the time for payment was fairely submitted to the jury as a question

told Meagher he would pay it just as soon as he got another [illegible]; and that Meagher replied it would be all right with him and with the Company, if it was paid at that time. Meagher [illegible] having had a conversation with appellee on this subject but [illegible] testified appellee it would be all right to pay the note after [illegible].

The provisions of an insurance policy for the [illegible] penalties forfeiture are inserted for the benefit of the company and may be waived. Provisions regarding the non-payment of a premium, [illegible] note, or instalment note are generally of a character that may be waived. (26 C. J. Fire Ins. Sec. 360-363; Phoenix Ins. Co. v. Hart, 149 Ill. 312.)

When the fire occurred, the earned premium was less than [illegible] which had been credited on the note, that is to say, the cost of carrying the insurance from the date of the policy to the time of the fire was less than the credit which was endorsed on the premium note. It is now urged by appellee that no arrangement of the policy could be had until such credit had been eliminated. In invoking the rule that where an insurance company attempts to cancel a policy, it must return the unearned premium before it can cancel the policy and that there can be no cancellation of the policy until the unearned premium has been returned to the policy holder. (Cookie M. [illegible] Co. v. Hotto, 47 Ill. 316; Home Ins. Co. v. McGuire, 1 Ia. 362; Williamson v. Hartfield, [illegible] Ins. Co. [illegible]; Blocck v. Frank Bayne Ins. Co. 177 Ia. 300; [illegible] Ins. Co. v. Tews, 102 Ia. 321.) Defendant cannot be one and the same time [illegible] the policy as alive for the purpose of exacting premium, and [illegible] the purpose of avoiding a loss. [illegible] (Hoag v. [illegible] Life Ins. Co. 202 Ill. App. 321.) While it would [illegible] to permit an insurance company to cancel the policy [illegible] unearned premiums in its hands, still it is not [illegible] this case on that ground. The question of [illegible] the time for payment was tacitly admitted to the jury as a question

of fact and the issue was decided in favor of appellee. We are of the view that the jury was right in reaching the conclusion that the provision of the policy for a suspension thereof in case of non-payment of the premium note at maturity had been waived.

In the application for insurance, appellee stated in response to printed interrogatories, that he was the sole and absolute owner of the property to be insured and that none of said property was under mortgage or other encumbrance. The application contains the following printed provision: "The foregoing is my own agreement and statement and is a correct description of the property on which indemnity is asked, and I hereby agree that insurance shall be predicated in such statement * * * *. and that the foregoing shall be deemed and taken to be promissory warranties running during the entire life of this policy." When the application was made, the property was encumbered by a chattel mortgage, and was so encumbered to and including the date of the fire loss. It is therefore apparent that unless the Company had knowledge of the existence of such encumbrance at the time the application was made and the policy issued, there can be no recovery.

It is the contention of appellee that the Company had such knowledge. Appellee testified that the answers to the interrogatories, concerning encumbrances, were not propounded to him, and that he did not say that there was no chattel mortgage on his property, and that he could not remember that he was asked anything about encumbrances; that the application was brought to him by Kelly, an agent of the Company, for signature. Kelly was well acquainted with appellee, knew what property he possessed, and admitted he knew that at least some of it was under mortgage. He adjusted appellee's first fire loss, but claimed he had nothing to do with the application for the policy now in question. Appellee testified that both Kelly and Meagher were active in the transaction and that the arrangements

of fact and the issue was decided in favor of appellee. In lieu of the view that the jury was right in accepted the contention that the provision of the policy for a suspension thereof in case of non-payment of the premium note at maturity has been waived.

In the application for insurance, appellee answered in response to printed interrogatories, that he was the sole and absolute owner of the property to be insured and that none of said property was under mortgage or other encumbrance. The application containing the following printed provision: "The insured hereby warrants the foregoing statements and is a concise description of the property on which insurance is asked, and I hereby agree that insurance shall be predicated on such statement" . . . and that the foregoing shall be deemed and taken to be representations warranties covering the entire life of this policy." Upon the application was made, the property was encumbered by a chattel mortgage, and was so encumbered to and including the date of the fire loss. It is therefore apparent that unless the jury had the judge of the existence of such encumbrance at the time the application was made and the policy issued, there can be no recovery.

It is the contention of appellee that the company had such knowledge. Appellee asserted that he answers to the interrogatories, concerning encumbrances, were not propounded to him, and that he did not say that there was no chattel mortgage on his property, but that he could not remember that he was asked anything about encumbrances; that the application was brought to him by Kelly, an agent of the Company, for signature. Kelly was well acquainted with appellee, knew that property was possessed, and admitted he knew that a loan and of it was under mortgage. He admitted actual knowledge of the loan, but claimed he had nothing to do with the application for the policy now in question. Appellee testified that Kelly and Hooper were active in the transaction and [illegible]

for the new policy were virtually made at the time of the adjustment of the loss under the old policy. Notice to the agent at the time of the application for insurance of facts material to the risk, is notice to the insurer and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent. (Home Insurance Co. v. Mendenhall, 164 Ill. 458; Weisguth v. Supreme Tribe of Ben Hur, 272 id. 541.) The different contentions of the parties with respect to Kelly's knowledge and participation in obtaining the application for insurance were submitted to the jury. The issue was found in favor of appellee. Under the facts and circumstances as shown by the record, it appears to us the jury was warranted in making the finding it did.

Where questions of fact have been submitted to a jury for their determination under the proper instructions, the verdict of the jury will not be set aside if the testimony by any fair and reasonable intendment, will authorize the verdict. (People v. Egan, 241 Ill. App. 189; Illinois Central Ry. Co. v. Gillis, 68 Ill. 317; Bradley v. Palmer, 193 id. 15; Carney v. Sheedy, 295 id. 78; Blackhurst v. James, 304 id. 586.)

Appellant tendered no instructions and two were given the jury on behalf of appellee. Those given correctly state the law as applied to the facts. No reversible error appears in the record and we believe the verdict is sufficiently supported by the evidence. The judgment is affirmed.

Judgment affirmed.

for the new policy were initially made at the time of the adjustment of the loss under the old policy. Across to the [illegible] of the application or insurance or fraud [illegible] in notice [illegible] and insurer has still present it [illegible] a forfeiture [illegible] waiver [illegible] Insurance Co. v. [illegible], 102 U.S. 428; [illegible] v. [illegible] Life of Ins Ins. 121 U.S. 521.) [illegible] partner with respect to [illegible] and [illegible] obtaining the application [illegible] were [illegible] The issue was [illegible] of [illegible]. [illegible] circumstances as shown by the record, it appears [illegible] warranties in making the [illegible] it did.)

Three questions of [illegible] been [illegible] determination [illegible] will not be [illegible] in the statement [illegible] insurance, will [illegible] App. 105; [illegible] v. [illegible] v. Talmer, 185 U.S. 149; [illegible] v. [illegible] James, 304 U.S. 552.)

Appellant [illegible] in [illegible] and [illegible] jury on behalf of appellee. [illegible] be applied to the facts. [illegible] and we believe the verdict [illegible] by the [illegible]. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal ot said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7965 Agenda No. 5

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D. 1928.

HAL CAMPBELL, appellant,	)	
v.	)	Appeal from the Circuit
COLOGERO DIGIOVANNI, appellee.	)	Court of Winnebago County

OPINION by BOGGS, J.

Appellant filed a bill in the Circuit Court of Winnebago County, seeking to restrain appellee from an alleged violation of a certain building restriction. Said bill alleged that appellant was owner of lot 1 in block 33 of Central Park Realty Company's Subdivision etc.; that appellee has purchased lot 1 in block 32 of said Subdivision, and "has taken possession of said lot and has commenced the erection of a wooden building thereon 9 x 16 feet in size, on the ground, and 8 feet in height, and that said building, when completed, would cost less than $500".

Said bill further alleges that the deed to said premises purchased by appellee "contains the following restrictions:

"'No building shall be placed closer than twenty feet from the front line of said premises without the written consent of the sellers being first obtained.

"'No building erected on lot shall be at a cost of less than one thousand five hundred ($1500.00) dollars;'" that appellee "has now placed a foundation on said lot for a house 23 by 23 feet in size on the ground facing Sunnyside avenue, which is a street adjoining said lot on the north, and that said foundation is 60 feet from Kilburn avenue, a street adjoining said lot on the east;

General No. 7965 Agenda No. 5

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D. 1928.

HAL CAMPBELL, appellant,	
v.	Appeal from the Circuit
TOLOGIRO DIGIOVANNI, appellee.	Court of Kane County

OPINION by EDGE, J.

Appellant filed a bill in the Circuit Court of Kane County, seeking to restrain appellee from an alleged violation of a certain building restriction. Said bill alleged that appellant was owner of lot 1 in block 22 of Tenney Park Realty Company's subdivision etc.; that appellee has purchased lot 1 in block 2 of said subdivision, and "has taken possession of said lot and has commenced the erection of a wooden building thereon 9 x 16 feet in area, on the ground, and 8 feet in height, and that said building, when completed, would cost less than $100".

Said bill further alleges that the deed to said premises purchased by appellee "contains the following restriction:

"'No building shall be placed closer than twenty feet from the front line of said premises without the written consent of the sellers being first obtained.

"'No building erected on lot shall be of a cost of less than one thousand five hundred ($1500.00) dollars;' that appellee "has now placed a foundation ostensibly for a house 9 x 16 feet in size on the ground facing Tennyson avenue, which is a street adjoining said lot on the north, and that said foundation is 20 feet from Kilburn avenue, a street adjoining said lot on the east;

* * * that the said building, 9 x 16 feet, now being built by said defendant, also said foundation wall 23 feet square on the ground, are each facing said Sunnyside avenue; and that in the construction of said building and in making of said foundation the defendant has adopted Sunnyside avenue as the front of the said lot 1 in said block 32 aforesaid; * * * that the north or front side of said foundation, as it stands today, is 16 feet distant only south from the south line of said Sunnyside avenue."

Said bill further alleges that said building and foundation for a building are each in violation of the building restriction above quoted; that appellant is interested in said Subdivision and also interested as the owner of his said lot; and prays that an injunction be issued, restraining appellee from proceeding further with said improvements, etc.

Appellee filed an answer, admitting the purchase by her of said lot and that the deed thereto contained the restriction set forth in said bill, buy denying the other allegations thereof, and averring that said building 9 by 16 feet was erected for the purposes of storing her chattels and household goods as well as working tools, during the process of constructing a residence building on said lot, * * * and that said wooden building was an accessory building incidental to the construction and use as contemplated of the main building or residence on said lot; * * * that Sunnyside avenue is not in front of her said lot, but to the side thereof, and that the front of said lot faces on Kilburn avenue, the same being an improved street."

Thereafter, by leave of court, appellant filed a supplemental bill, setting forth "that since the filing of the original bill herein, the defendant is proceeding to erect another building on said lot, the north line of said building being but 6 feet south of the south line of said Sunnyside avenue," and praying that said construction be also enjoined, etc.

Appellee filed an answer to said supplemental bill, admitting "that since the filing of the original bill herein, she has proceeded to erect another building on said lot, the north line

* * * that the said building, 5 x 16 feet, now being built by said defendant, also said foundation wall 23 feet square on the ground, are upon facing said Sunnyside avenue; and that it was a violation of said building and in violation of said Ordinance No. defendant has adopted Sunnyside as the front of the said lot, in said block 96 aforesaid; * * * that the north line of said foundation, as it stands today, is 10 feet between and south from the south line of said Sunnyside avenue."

Said bill of complaint alleges that said building is unsuitable for a building and said in violation of the building restriction above quoted; that appellant is interested in said lot, also and also interested as the owner of the said lot; and irreparable injury and injunction be issued, restraining appellee from proceeding further with said improvement, etc.

Appellee filed an answer, admitting the purchase by him of said lot and that the deed therefor contained the restriction set forth in said bill, but denying the other allegations thereof, and averring that said building 5 x 16 feet was erected for the purpose of storing his chemicals and household goods as well as working tools, during the process of construction of residence building on said lot, * * * and that said model building was to accommodate building incidental to the construction and to be occupied of the main building or residence on said lot; * * * that Sunnyside avenue is not in front of the said lot, but to the side thereof, and that the front of said lot faces on Clinton avenue, the same being an improved street."

Thereafter, by leave of court, appellant filed a supplemental bill, setting forth "that since the filing of the original bill herein, the defendant is proceeding to erect another building on said lot, the north line of said building being 10 feet south of the south line of said Sunnyside avenue, and praying that said construction be also enjoined, etc.

Appellee filed an answer to said supplemental bill, admitting "that since the filing of the original bill herein, he has proceeded to erect another building on said lot, the north line

of said building being but six feet south of the south line of Sunnyside avenue," but denying that this is in violation of said restriction, etc.

Upon hearing in open court, the court found "that the said lot is approximately 50 x 150 feet in dimensions, and that the narrow or fifty-foot side of said lot abuts on Kilburn avenue on the east, and that the longer or one hundred fifty-foot side on said lot abuts on Sunny side avenue on the north; and the court finds that the said lot fronts on the said Kilburn avenue, and that the front of said lot is not in the direction of Sunnyside avenue on the north;" that appellee had commenced the erection of a wooden building on said lot 9 x 16 feet in size, and that the same when completed would cost less than $500; and that the deed to said lot contained the restriction set forth in appellant's bill. A decree was rendered, ordering that said wooden building be removed from said premises within six months from the date of said decree and that appellee be enjoined and restrained from erecting on said premises any building costing less than $1,500.00, as provided by the terms of said deed. To reverse said decree, this appeal is prosecuted.

No brief and argument was filed by appellee. We would have been warranted in reversing said cause pro forma, but have deemed best to consider the same on the merits.

In his brief and argument, counsel for appellant states:

"Two questions are involved in this case as follows:

"1. As to the legality of the building restrictions in question.

"2. As to the legal construction of the words 'front line' as used in said building restrictions."

On the hearing, H. W. Herron testified on behalf of appellant that he took certain photographs of appellee's premises. These photographs were offered and admitted in evidence, but are not found in the certificate of evidence, nor have the originals been certified to us for inspection. This witness further testified: "The Digiovanni building was then located on lot 1, block 32. This

of said building being but six feet south of the north line of Sunnyside avenue," but denying that this is in violation of said restriction, etc.

"Upon hearing in open court, the court found that the said lot is approximately 50 x 150 feet in dimensions, and that the narrow or fifty-foot side of said lot abuts on Sunnyside avenue on the east, and that the longer or one hundred fifty-foot side of said lot abuts on Sunny side avenue on the north; and the court finds that the said lot lights on the said Sunny side avenue, and that the front of said lot is not in the sense of the restriction avenue on the north;" that appellee had commenced the erection of a wooden building on said lot 9 x 12 feet in size, and that the same when completed would cost less than $500; and that the lot to said lot contained the restriction set forth in appellants bill. A decree was rendered, requiring that said wooden building be removed from said premises within six months from the date of said decree and that appellee be enjoined and restrained from erecting on said premises any building costing less than $1,000.00, as provided by the terms of said deed. To reverse said decree, this appeal is prosecuted.

No brief and argument has filed by appellee. It could have been warranted in reversing said cause pro forma, but here doubtless best to consider the case on the merits.

In his brief and argument, counsel for appellant state:

"Two questions are involved in this case of [illegible]

"1. As to the legality of the building restriction in question.

"2. As to the legal construction of the [illegible] as used in said building restrictions."

On the hearing, A. V. Barron testified on behalf of appellee that he took certain photographs of appellee's [illegible]. These photographs were offered and admitted in evidence, [illegible] found in the certificate of evidence, but have the [illegible] certified to us for inspection. [illegible]

"The improvement building was here located on lot 1, [illegible]

building was in the southwest portion of the lot. That building was 9 by 16 feet and about 8 feet high. Nothing but a little block of earth to rest the building on. Building was about 12 inches from the surface of the ground. * * * There is a concrete foundation there 23 feet square. The 16 feet way of that building faces the north; the 9 feet way of the building faces west. It is 16 feet from the north line and 60 feet from the east line of the lot to the concrete foundation. It is on lot 2, block 32. * * * From what I have learned, I could tell the cost of this 9 by 16 feet building when completed. It would not exceed 250 dollars."

This witness was recalled and testified further: "Since I took the photographs testified to there has been a new foundation started and another building built in the corner of Kilburn avenue and Sunnyside avenue. The new one is 6 feet south of the sidewalk on Sunnyside avenue and about 20 feet back from the center of the building about four feet square being built in the southwest corner of the lot. The new foundation is about 20 by 20. The foundation has been poured."

George A. Rubin testified on behalf of appellant that he was in the real estate business in Rockford, and originally had Central Park platted and recorded and sold it as lots, in 1915; that "Kilburn avenue is one of the main arteries from 13 townships leading to Rockford. It runs north and south. Sunnyside avenue runs west. It begins at Kilburn avenue. Lot 1 in Block 32 is in that subdivision. It is at the southwest corner of Kilburn and Sunnyside. It was first conveyed to Ben Stone. We put in cement sidewalks on Sunnyside avenue, cement curb, extended the electric pole line, cindered the street, set out two trees in front of each lot and graded the street the street. Lots are 50 by 133 and a sufficient alley. Lot 1 in block 32 is 140 by 48. The 48 feet front faces on Kilburn avenue. The 140 feet front faces on Sunnyside avenue. Sunnyside avenue has been used considerably on account of the addition west of Central Park. They are laying sewers there now."

Appellant also offered in evidence the deed to the premises

building was in the southwest portion of the lot. The building was 9 by 16 feet and about 8 feet high. Workmen had a [illegible] of earth to rest the building on. Building was about 12 inches from the surface of the ground. * * * [illegible] in a remarkable condition in the [illegible] square. The 12 inch way of [illegible] being the 9 foot way of the building [illegible] from the north line and 60 feet from the east line [illegible] concrete foundation. It is on lot 6, block [illegible]. [illegible] have learned, I am told, the cost of [illegible] when completed. It would not exceed [illegible] dollars."

This element was realized [illegible] I took the photographs described to [illegible] and [illegible] and Summerdale avenue. [illegible] on Summerdale avenue [illegible] the building [illegible] corner of the lot. [illegible] foundation has been [illegible].

George A. Smith testified on behalf of [illegible] was in the real estate business in Chicago, and [illegible] general junk plastered and recorded [illegible] the "Kilbourn avenue is one of the main arteries [illegible] leading to Rockford. It runs north and south. Summerdale avenue runs east. It begins at Milwaukee avenue. Lot 1 in Block 12 is west subdivision. It is at the southwest corner of Kilbourn and Summerdale. It was first improved in ten years. [illegible] sidewalks on Summerdale avenue, street curb, excepted the [illegible] pole line, sheltered the corner, and the [illegible] lot and graded the street [illegible]. [illegible] sufficient alley. Lot 1 in Block 12 is 120 by [illegible] front faces on Kilbourn avenue. [illegible] Summerdale avenue. Summerdale avenue has been [illegible] account of the additions made of [illegible] sewers there now."

Appellant also [illegible] in [illegible]

owned by him, and the deed to Ben Stone, under whom appellee held the premises here involved. This was all of the evidence, no evidence having been offered by appellee.

While, as contended by counsel for appellant, restrictive clauses in deeds, where not unreasonable, are upheld by the courts, yet covenants of a character which hamper the free use of the property are to be strictly construed against the restriction, and all doubts are to be resolved in favor of the reasonable use of the property. Eckhart v. Irons, 128 Ill. 582; Hutchinson v. Ulrich, 145 Ill. 336-342; Ewertsen v. Gerstenberg, 186 Ill. 344-349; Curtis v. Rubin, 244 Ill. 88-92; Loomis v. Collins, 272 Ill. 221-232; Boylston v. Holmes, 276 Ill. 279-285.

Where a doubt arises on the construction of a building restriction, as to which way the building sought to be enjoined fronts, that doubt is to be resolved against the restriction. Boylston v. Holmes, supra, 286. Whether a building fronts on one or the other of two streets is a question of fact, to be determined ~~by~~ from the evidence in the record. In Hawes v. Favor, 161 Ill. 440, the court at page 448 says:

"Whether the covenant to front buildings on the park was violated by erecting the new structure, presents a question of fact, upon which the evidence is conflicting. Counsel for appellant insist that certain photographs of the building, offered in evidence, clearly show that it fronts on Fifty-first street and not on the park. It may be, if one were called upon to determine from the mere exterior of the building which would more properly appear to be the front, the contention would be correct. Evidently, from these photographs and the testimony of the various witnesses, it was intended that the house should have the external appearance of fronting both on the street and the park. But a majority of the witnesses, who were acquainted with the interior of it as well as the exterior, state that it fronts on the park, and among them is the architect who designed it. It certainly cannot be said from the evidence in this case that it does not front on the park,

owned by him, and the deed to Ten Stone, under which applicant held the premises here involved. This was all of the evidence, no evidence having been offered by appellee.

While, as intended by counsel for appellee, questions of dimensions in deeds, where not unreasonable, are controlling, yet courses or a compass which respect the lines of the property are to be strictly construed against the surveyor, and all doubts are to be resolved in favor of the vendee as to the property. Gebert v. Lynn, 125 Ill. 326; Wyckoff v. Lynn, 145 Ill. 336-342; Wortley v. Hetherington, 154 Ill. [illegible]; Nevin v. Dunlap, 214 Ill. 88-92; Lewis v. Collins, 237 Ill. [illegible]; Boylston v. Adams, 276 Ill. 279-285.

There is doubt arises as to the construction of a building restriction, as to which way the building is to be erected in front, that doubt is to be resolved against the restriction. Boylston v. Adams, supra, 284. Whether a building fronts on one or the other of two streets is a question of fact, to be determined by from the evidence in the record. In Yates v. Yates, 1 Ill. App. 440, the court at page 444 says:

"Whether the covenant to front buildings on the park was violated by erecting the new structure, presents a question of fact, upon which the evidence is conflicting. Counsel for appellee insist that certain photographs of the building, offered as evidence, clearly show that it fronts on Fifty-first street and not on the park. It may be, if one were called upon to determine from the mere exterior of the building which way it would appear to be the front, the contention would be correct. Although, from these photographs and the testimony of the various witnesses, it was intended that the house should have the external appearance of fronting both on the street and the park. But [illegible] of the witnesses, who were acquainted with the intention of [illegible] as well as the exterior, state that it fronts on the park. The house which is the architect who designed it. It appears clearly from the evidence in this case that it does not front on the park,

and, in our view of the proper and legal construction of the covenant claimed to have been violated, it is immaterial whether it also fronted on Fifty-first street or not."

As stated, the photographs which were offered and admitted in evidence are not a part of the record and are not before us for inspection. If the photographs did not indicate something with reference to the street on which said foundation purported to front, there is nothing to so indicate. The evidence, all of which was offered by appellant, discloses that "Kilburn avenue is one of the main arteries" of travel, leading into Rockford, while Sunnyside avenue is a street only fifty feet wide, beginning at Kilburn avenue and extending west. If the facts and circumstances disclosed by the evidence tend to any conclusion, it is that appellee was fronting the building to be erected on said foundation on Kilburn avenue. Certainly there is no evidence on which the court could base a finding that she was facing the same on Sunnyside avenue.

So far as said foundation is concerned, the court was warranted in finding that it did not violate said building restriction. As to the frame building, said decree required that appellee remove the same from said premises within six months. Appellant is therefore not in a position to complain of the decree in connection therewith. As to the second foundation or basement on the premises, complained of in the supplemental bill, the testimony of appellant's witnesses is that it was six feet from Sunnyside avenue and twenty feet from Kilburn. Presumably, it is intended to face on Kilburn avenue, in which event there would be no violation of the restriction, there being no restriction against erecting more than one building on each lot.

It might be further observed that the restriction sought to be enforced is that "no building shall be placed closer than twenty feet from the front line of said premises without the written consent of the sellers being first obtained." Even conceding that Sunnyside avenue is the front of said lot, the bill did not charge and no proof was offered tending to show that the consent of the

and, in our view of the proper and legal construction of the covenant claimed to have been violated, it is immaterial whether it came from 31 Fifty-first street or not."

As stated, the photographs which were offered and admitted in evidence are not a part of the record and are not before us for inspection. The photographs did not indicate anything with reference to the street on which each tenement purported to front, there is nothing to do in fact. The evidence, and as stated was offered by appellant, indicates that Kilbourn avenue is one of the "main arterial streets", meaning, we suppose, Summerdale avenue is a street and that Kilbourn avenue and Summerdale avenue are adjacent. If the tracts are contiguous, discovered by the evidence, and in the judgment, it is that appellee was trying the matter to be decided on such tracts on Kilbourn avenue. Essentially there is no evidence to which the court could base a finding that she was facing the same on Summerdale avenue.

As far as said transaction is concerned, the court was warranted in finding that it did not wish to make nothing resembling tion. As to the frame building, said deed [illegible] appellee remove the same from said premises within six months. Appellant is therefore not in a position to complain of the decree in connection therewith. As to the use of tenements on Kilbourn premises, complained of in the cross-bill, the preponderance of appellee's witnesses is that in one flat from [illegible] and twenty feet from Kilbourn. Nevertheless, it is conceded by this on Kilbourn avenue, in which event there would be a violation of the restriction, there being no restriction against erecting more than one building on each lot.

It might be further observed that the restriction would be complained of is that the building would be [illegible] twenty feet from the front line of said premises, the covenant of the owners being that "not [illegible]." Some [illegible] Summerdale avenue is the front of said lot, the [illegible] and no proof was offered tending to show that the covenant of the

sellers had not been obtained by appellee, previous to commencing said building.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice,

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On MAY 6 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 797

Agenda No. 8.

Frank P. Schmidt, Henry J. Schmidt, Louis A. Schmidt, Joseph W. Maple, Trustee,

appellants,

vs.

Albert Randall,

appellee,

Appeal from Circuit Court of Peoria County, Illinois.

OPINION by BOGGS, J.

On November 10, 1920, appellants, Frank P., Henry J., and Louis A. Schmidt, being the owners of the premises in question, a coal mining property located in Peoria county, conveyed the same, with the machinery and appurtenances, to the Leitner Coal Company. On the same day said coal company executed a trust deed to appellant Maple on said premises, including said equipment, securing certain notes to appellants Frank P. Henry J., and Louis A. Schmidt, the last of which said notes were to become due and payable four years after date.

On December 30, 1921, a bill was filed by appellants to foreclose said trust deed. On May 19th, 1922, during the pendency of said proceedings, The Herget National Bank procured a judgment by confession in the circuit court of said county against said coal company for $10,516.67; an execution issued on said judgment was, by the sheriff of said county, levied on the equipment theretofore used in said mine. Notice of sale under said execution was given by the sheriff, as provided by statute. Prior to the time fixed for said sale, notice in writing was given said sheriff by appellants Schmidt of the execution of said notes and trust deed, and that a bill to foreclose said trust deed was pending, and "that the complainants in said foreclosure claim a valid first lien under said trust deed on all the property so levied on".

General No. 7977 Term No. [illegible]

Frank P. Schmidt, Henry C.
Schmidt, Louis A. Schmidt,
Joseph A. Maple, Trustee,
appellants,

vs.

Albert Hardell,
appellee.

appeal from Circuit Court of
Scott County, Illinois.

OPINION BY [illegible], J.

On November 1st, 1900, appellants, Frank P., Henry C., and Louis A. Schmidt, using the owners of the premises in question, a coal mining property located in Scott county, conveyed the same, with the machinery and appurtenances, to the Peitner Coal Company. On the said day said coal company executed a trust deed to appellant Maple on said premises, including said equipment, securing certain notes to appellants Frank P., Henry C., and Louis A. Schmidt, the last of which said notes were to become due and payable four years after date.

On December 6th, 1921, a bill was filed by appellants to foreclose said trust deed. On May 19th, 1922, during the pendency of said proceedings, the Peitner National Bank procured a judgment by confession in the circuit court of said county against said coal company for $10,000.00; an execution issued on said judgment was, at the benefit of said county, levied on the equipment [illegible] in said mine. Notice of sale under said execution was given by [illegible] sheriff; as provided by statute. Prior to the time fixed for said sale, notice in writing was given said sheriff by appellants [illegible] of the execution of said notes and trust deed, [illegible] foreclosed as said trust deed was pending. And "that the complainants in said foreclosure claim a valid first lien under said trust deed on all the property so levied on".

On June 18, 1923, the sheriff of said county made sale of said equipment to one Henry Graber, Junior, for $1,065.50. Thereafter, on April 30, 1925, a decree was entered foreclosing said trust deed and for sale of said premises. On February 25, 1926, appellants instituted the present suit against appellee to recover damages alleged to have been suffered on account of said levy and sale.

The declaration consists of two counts. Appellants concede that the first count is in trespass, but contend that the second count is in case. An examination of the second count discloses that it is also a count in trespass, it being averred that on, to-wit, February 29, 1924, and on divers other dates, etc., with force and arms, etc., defendant broke and entered a certain close and mine of the plaintiffs, etc.," and concludes "against the peace of the people of this state".

To said declaration appellee filed a plea of the general issue and certain special pleas, to which special pleas demurrers were sustained. As no cross errors are assigned, it is not necessary to further discuss said pleas. A jury was waived, and on the trial the issues were found for appellee, and judgment was rendered against appellants, in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

While numerous errors are assigned, the principal question involved is as to whether an action of trespass will lie. On the trial, propositions of law were submitted by appellants to the effect that said mining equipment was, as to said trust deed, real estate and a part of said security. These propositions were held by the court. Appellee concedes that, as he did not assign cross errors, said finding is conclusive.

The action of trespass is a possessory action, and, at common law, "one must have a property (either absolute or temporary) in the soil and actual possession by entry, to be able to maintain an action of trespass." Blackstone's Com., vol. 3, p. 211. "In

On June 10, 1922, the sheriff of [illegible] county [illegible] said equipment to one Henry Grauer, Jackson, for $1,[illegible]. Thereafter, on April 20, 1922, a decree was entered [illegible] feed and for sale of said property. On February 28, [illegible] instituted the present suit against appellees to recover [illegible] legal to have been rendered on account of said [illegible].

The defalcation consists of two counts. Appellees [illegible] that the first count is in trespass, but contends that the second count is in case. An examination of the second count discloses that it is also a count in trespass, it being averred that [illegible] to-wit, February 20, 1922, and on divers other days, etc., with force and arms, etc., defendant broke and entered a certain close and house of the plaintiff, etc., and therein [illegible] the peace of the people of said State".

To make defalcation appellee filed a plea of the general issue and certain special pleas, to which special pleas demurrers were sustained. No cross errors are assigned, [illegible] assay to further discuss said pleas. A jury was waived, and [illegible] trial the issues were found for appellee, and judgment was entered against appellant, in bar of action and for costs. [illegible] judgment, this appeal is prosecuted.

While numerous errors are assigned, the principal question involved is as to whether an action of trespass will lie. [illegible] trial, propositions of law were submitted by appellant to the effect that said mining equipment was, as to said [illegible], real estate and a part of said property. These propositions were [illegible] the court. Appellee concedes that, as he is not [illegible] said finding is conclusive.

The action of trespass is a possessory action, [illegible] law, the suit must have a property (either absolute or [illegible]) in the soil and actual possession thereof, to be able to maintain an action of trespass." Blackstone's Com., vol. 3, p. [illegible]

order to maintain an action of trespass quare clausum fregit, the plaintiff must, at the time of the trespass, be in the actual or constructive possession of the land on which the acts of trespass were committed." 26 R.C. L. p. 955, sec. 32; Halligan v. C. & R. I. R. R. Co., 15 Ill. 558-559; Dean v. Comstock, 32 Ill. 173-178; Winkler v. Meister, 40 Ill. 349-351. Trespass quare clausum fregit does not lie, except for injuries to possession. Fort Dearborn Lodge v. Klein, et al, 115 Ill. 177-189.

Counsel for appellants practically concede the general rule to be as above stated, but insist it does not apply in this case, for two reasons: First, it is contended that a mortgagee or trustee, upon condition broken, can maintain actions of ejectment and trespass.

No specific proof was offered to the effect that the condition of said trust deed, at the time this suit was instituted, was broken. Appellants, however, say that the facts and circumstances in evidence could lead to but one conclusion, viz., that at that time certain of the conditions of said trust deed were in fact broken. Assuming this to be true, it does not follow that appellants, as the holders of said notes and as such trustee, were in either the actual or constructive possession of said premises. Appellants cite Massachusetts and certain other states as holding that the right to possession by reason of condition broken in a trust deed is sufficient to maintain the action of trespass, but concede that they have found no case in this state so holding. The authorities in this state hold that, for condition broken, a mortgagee or trustee may maintain an action of ejectment, but until such suit is brought and judgment rendered thereon, such trustee or mortgagee does not have possession, actual or constructive. As the action of trespass is a possessory action, it cannot be maintained by a mortgagee after condition broken, until actual or constructive possession has been obtained.

The second reason advanced as to why actual or constructive possession is not necessary is that, under section 36 of the Practice

order to maintain an action of trespass [illegible] plaintiff must, at the time of the trespass, [illegible] constructive possession of the land on which the [illegible] were committed." 50 C.J. p. 755, sec. 3[illegible]; [illegible] v. [illegible], 16 Ill. 136-139; Dean v. [illegible], 19 Ill. 172-173; Winder v. [illegible], 40 Ill. 345-351. [illegible] does not lie, except for injuries to possession. [illegible] v. Ziem, et al, 110 Ill. 117-122.

Counsel for appellee practically concede the general rule to be as above stated, but insist it does not apply in this case, for two reasons: first, it is contended that a mortgagee or trustee, upon condition broken, can maintain trespass and trespass.

No specific proof was offered to the effect that the construction of said tower dead, at the time [illegible] was broken. Appellants, however, say that the facts and circumstances in evidence could lead to but one conclusion, viz., that at that time certain of the conditions of said bond were in fact broken. Assuming this to be true, it does not follow that appellants, as the holders of said notes and as such trustees, were in fact the actual or constructive possession of said premises. Appellee's attorneys and certain other states as holding that no right to possession by reason of condition broken in a trust deed is sufficient to maintain the action of trespass, but concede that [illegible] case in this state to the contrary. The authorities in [illegible] that, for condition broken, a mortgagee or trustee can maintain an action of ejectment, but until such suit is [illegible] and judgment entered thereon, such trustee or mortgagee has not [illegible] actual or constructive. As the action of trespass is a possessory action, it cannot be maintained by a mortgagee or trustee [illegible] until actual or constructive possession has [illegible].

The second reason advanced as to why actual or constructive possession is not necessary is that, under section 18 of the [illegible]

act, appellants are to be held the owners of said premises, and to have the right to maintain their cause of action without being in possession.

Said section (Cahill's Stat., ch. 110, sec. 36,) among other things, provides: "It shall be lawful for any owner of real estate, though not in possession of the same, where the same is in possession of some person or persons claiming under him, as tenant or otherwise, to bring an action in trespass or case for any injury to his interest in such land as owner, reversioner, remainderman, or otherwise, the same as if in possession of the land, against the person or persons claiming under him, or against any stranger committing injury to the rights of such person in said land."

As between the mortgagee and the mortgagor, in an action at law, the trustee or the mortgagee is held to be the owner of the premises. Carroll v. Ballance, 26 Ill. 9-16; Oldham v. Pfleger, 84 Ill. 102-103; Esker v. Heffernan, 159 Ill. 38-42; Ware v. Schintz, 190 Ill. 189-193. The mortgagor or his assignee, however, is the legal owner of the mortgaged estate as against all persons excepting the mortgagee or his assigns. Esker v. Heffernan, 159 id. 38-42; Lightcap v. Bradley, 186 Ill. 510-519; Ware v. Schintz, supra, 193.

As this suit is not by the trustee and holders of said notes against the mortgagor, but against a third party, as to such third party appellants were not, at the time of the institution of said suit, the owners of said property.

A careful examination of said section 36 will disclose that appellants' construction thereof is not correct. Whatever rights appellants have in said premises were derived from the Leitner Coal Company. Appellants were neither the owners, the reversioners or the remaindermen of said premises as against appellee. The Leitner Coal Company held possession of said property at the time said suit was instituted.

act, appellants are to be held the owners of said premises, and to have the right to maintain their cause of action without being in possession.

Said section (Dodd's stat., ch. 120, sec. 44,) among other things, provides: "It shall be lawful for any claimer of real estate, though not in possession of the same, where the same is in possession of some person or persons claiming under him, as tenants or otherwise, to bring an action in trespass or case for any injury to his interest in such land as owner, tenant, remainderman, or otherwise, the same as if in possession of the land, against the person or persons claiming under him, or against any stranger committing injury to the rights of such person in said land."

As between the mortgagee and the mortgagor, in an action at law, the trustee or the mortgagee is held to be owner of the premises. Carroll v. Safford, 70 Ill. 8-14; Adams v. Pilger, 84 Ill. 128-133; Yeker v. Heffernan, 129 Ill. 36-43; Ware v. Mantle, 190 Ill. 182-190. The mortgagor or his assignee, however, is the legal owner of the mortgaged estate as against all persons except the mortgagee or his assigns. Yeker v. Horle ibid, 129 Ill. 36-43; Bigelow v. Bradley, 168 Ill. 618-629; Ware v. Mantle, supra, 190.

In this suit is not by the trustee and holders of said notes against the mortgagor, but against a third party, as to whom the party appellants were not, at the time of the institution of said suit, the owners of said property.

A careful examination of said section 34 will disclose that appellants' construction thereof is not correct. Appellants rights as appellants in said premises were secured from the Delmont Coal Company. Appellants were neither the owners, nor tenants, or the remainderman of said premises as against appellee. The Delmont Coal Company held possession of said property at the time said suit was instituted.

It might be further observed in this case that appellants at the timethe notice in question was given to said sheriff, were not claiming to be the owners of said premises, but were claiming "a valid first lien under said trust deed on all of the property so levied on."

Appellants, not having the actual or constructive possession of said premises, are not in a position to maintain their cause of action, and the court did not err in so finding.

It will not be necessary, therefore, for us to discuss the other questions attempted to be raised by the assignment of errors.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 8 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7945

Tador Kapinsky, Defendant in error,	:	
v.	:	Error to Circuit Court of LaSalle County, Illinois.
Anna Hlawaty, Plaintiff in error,	:	

Jones, P.J.

This cause is before us on a writ of error to reverse a judgment in favor of Tador Kapinsky against Anna Hlawaty. They will be referred to herein as plaintiff and defendant respectively.

The declaration consisted of a single count for money loaned as evidenced by a promissory note for $425. The instrument purports to have been executed by defendant, and a copy of it was attached to the declaration. Defendant filed the general issue and a verified plea denying the execution and delivery of the note. No similiter was filed and the cause was continued several times covering a period of more than 7 years. Plaintiff subsequently sued out an attachment in aid. Later the cause was called for trial. Plaintiff and his attorney appeared in court. Defendant had moved away from LaSalle County and was living in the State of Iowa. Her attorney had died prior to the time the cause was called for trial. She did not learn of his death until a few days prior to the entry of judgment. No one appeared for her and in her absence a default was entered against her. The court, without a jury, heard evidence on the attachment issue, and as to the amount due on the note. No evidence was heard on the issue raised by the plea denying the execution of the note.

Judgment was entered against the defendant as by default. At the same term of court, the defendant appeared by counsel and entered a motion to set aside the default and for a new trial. The motion was denied.

Defendant, having pleaded to the declaration, was not in default. So far as she was concerned the cause was at issue. Under that state of the record, it was error to enter a default against her and proceed to hear the cause without submitting to a

Tudor Kopinsky, Defendant in error, :

v. :

Anna Hlavaty, Plaintiff in error, :

Error to Cuyahoga County, Common Pleas.

Jones, J.:

This cause is before us on a writ of error to review a judgment in favor of Anna Hlavaty, plaintiff in error, and against Tudor Kopinsky, defendant in error. They will be referred to herein as plaintiff and defendant respectively.

The declaration consisted of a single count, for damages laused as evidenced by a promissory note for $[illegible]. The instrument purports to have been executed in Cleveland, and a copy of it was attached to the declaration. Defendant filed the general issue and a verified plea denying the execution and delivery of the note. To plaintiff's replication the defendant demurred several times covering a period of more than 2 years. Defendant subsequently made [illegible] motions to dismiss, [illegible] for the cause called for trial. Plaintiff's motion [illegible] granted in court. Defendant had moved away from Cleveland [illegible] the state of Ohio. The attorney had [illegible] the case was called for trial. She did not [illegible] until a few days prior to the entry of judgment. [illegible] for her and in her absence a default was entered against her. The court, without a jury, heard evidence on the [illegible] issue, and as to the amount due on the note. [illegible] judgment for the same [illegible] the defendant.

Judgment was rendered against the defendant by default. It was long past 10 o'clock, the defendant's attorney counsel had entered a motion to set aside the default and for a new trial. The motion was denied.

Defendant, having excepted to the decision, [illegible] in default. So far as it was concerned the order was in [illegible]. Under that state of the record, it was error to enter a judgment against her and proceed to hear the cause without [illegible]

jury the issues raised by the plea. (Archer v. Spillman, 1 Scam. 552; Paul v. People, 82 Ill. 82; Meras v. Adinamis, 195 Ill. App. 92; Wacker v. Young, 172 Id. 255; Thomas v. McGuinniss, 94 id. 248.) The case at bar is not one of the class of cases where the right of trial by jury was waived either expressly or by conduct implying such a waiver.

There was no testimony offered which tended to show that defendant executed the note in question. Without any evidence on that issue, plaintiff had no right to recover a judgment. Neither was there proof sufficient to support a judgment in attachment upon any of the grounds set forth in the affidavit.

The judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

jury the issues raised by the plea. (Ancker v. [illegible], 7 Cass. 382; Paul v. People, 82 Ill. 82; [illegible] v. [illegible], [illegible] Ill. 39; [illegible] v. [illegible], 172 Id. 505; [illegible] v. [illegible], [illegible] Id. 245.) The case at bar is not one of the class in which [illegible] the right of trial by jury was waived either expressly [illegible] conduct implying such a waiver.

There was no testimony offered which tended to show that defendant exercised the mode in question. [illegible] on that issue, plaintiff had no right to [illegible]. Neither was there direct evidence to support a judgment [illegible] upon any of the grounds not [illegible].

The judgment of the trial court is reversed and the cause remanded.

[illegible].

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On MAY 9 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AMOS CADWELL, Appellee,	)	
	:	
v.	)	APPEAL FROM THE CIRCUIT COURT OF KNOX COUNTY.
	:	
J. E. MALEY, Appellant,	)	

JONES, P. J.

This is an action brought by appellee, Amos Cadwell, against appellant, J. E. Maley, before a justice of the peace to recover wages of labor. Judgment was rendered by the justice of the peace in favor of appellee. An appeal was taken to the circuit court and the cause was tried by a jury which returned a verdict for $87 in appellee's favor. Judgment was rendered on the verdict for that sum, together with attorney's fees of $15 for the trial before the justice of the peace and $35 for the trial in the circuit court. An appeal was thereupon taken to this court.

Appellant, Maley, was the owner of an apartment building located at 659 W. South Street in the City of Galesburg. He wanted the grass in the rear of the building mowed with a scythe and went in search of someone to do the work. He drove his automobile to the "Puff Pool Room". Upon entering the pool room, he asked an elderly man if he wanted the job. The man replied he was sick but that his son in law, meaning the plaintiff, knew how to mow with a scythe and would do the work. Appellant then engaged appellee to mow the grass. This was about the 14th day of June, 1927.

The controversy in this case arises over the terms of the agreement entered into between the parties. While the original employment related only to mowing the grass, subsequent conversation between them led to a further agreement which contemplated a somewhat steady employment, whereby appellee was to perform labor for appellant in connection with various properties owned by appellant and was to receive

ALICE GRAVELLE, Appellee,)
v.)
E. E. MAINE, Appellant,)

Error to
Superior Court
Cook County.

Jones, J. P.

This is an action brought by appellee, Alice Gravelle, against appellant, E. E. Maine, before a justice of the peace to recover wages if large. Judgment was rendered in favor of the plaintiff for $27 in the justice's court. On appeal to the circuit court and the jury was waived and a trial had, a jury was empaneled and a verdict for $27 in favor of plaintiff was returned on the verdict for that sum. Appellant filed a motion for a new trial for the trial before the jury of the court and for the trial in the circuit court. An appeal has been taken to this court.

Appellant, Maine, was the owner of an apartment building located at 6[illegible] Cook Street in the city of Chicago. He worked the grass in the rear of the building and a sister and wife in charge of somewhere to do the work. He drove his automobile to the "Well Dog Room". When entering the pool room, he saw an elderly man in the waiting room. The man replied he was sick but that he was not in bed, [illegible] plaintiff, drew her to one side and [illegible] work. Appellant then engaged appellee to work for him. [illegible] about the 15th of June, 1920.

The contention in this case [illegible] of the agreement entered into between the parties. [illegible] defendant employed plaintiff only to [illegible] general housework. [illegible] which contemplated a [illegible] agreement, [illegible] employee was to perform labor for appellant in [illegible] with various [illegible] owned by appellant and to [illegible]

for such labor, wages and a place to live. The chief dispute is as to the rate of wages appellee was to receive. Appellant contends that the rate fixed was $45 per month, but appellee claims that it was to be 35¢ an hour.

Each of the parties was corroborated by other withesses. Varner and Cozad testified that they were in the pool room at the time appellant came in and engaged appellee to mow the grass; that they walked out of the pool room with the parties to the suit and heard appellant say that he would pay appellee 35¢ an hour and give him a place to live. On the other hand, two witnesses produced by appellant, Showalter and Sholl, testified they were standing in front of the pool room at the time the parties came out and that they did not see Cozad and Varner or hear appellant make any statement to appellee about wages. Witnesses, Koppel and Plumer, testified to alleged admissions of appellee that he was receiving $45 a month.

About July 18, 1927, appellee moved from the apartment building to another house owned by appellant and the latter claims that appellee never worked for him after that date. He also claims that on July 23rd, he and appellee had a settlement at which time it was determined that there was $1.50 due appellee; that appellee said that he was in need of more money with which to buy groceries and asked appellant to loan him $3.50; that appellant accordingly made out a check for $5.00 and wrote upon the face of it the following, "In full to date. $3.50 over for wages."; that he read the check to appellee and that the witness Ryan heard the conversation between them and saw the check at the time it was written; that the check was cashed by appellee who never repaid the loan of $3.50; and that no further demand was made for wages until after appellee had been evicted from appellant's house.

Appellee denied that the check was read to him, but asserted that he examined it; that it did not contain the notation above referred to at the time it was cashed; that no final settlement was made between the parties at the time

[illegible]

it was given; and that it was not determined that there was a balance of $1.50 due him. It is his contention that the check for $5.00 was given on account only.

Appellant states in his brief that the evidence is irreconcilable. Certain it is, there is much dispute about the facts in the case. We have carefully examined the abstract and record, and the contentions of the parties with respect to the facts cannot be reconciled. If the testimony of appellee and his witnesses is to be believed, the judgment was rightfully rendered in his favor, but if the testimony of appellant and his witnesses is true, then there should be no recovery. Two trials have been had, one before a justice of the peace and another in the circuit court by a jury of twelve men. In both instances, the issues were found in favor of appellee. Under the circumstances, the verdict of the jury and the action of the trial court in overruling a motion for a new trial, is entitled to great weight. The jury and the trial judge were in much better position to test the credibility of witnesses and to determine the weight to be given to their testimony than is a reviewing court. In this case there is ample reason for the application of the rule that the verdict of a jury and the judgment of a trial court will not be disturbed unless such verdict and judgment are so manifestly against the weight of the evidence that justice requires a reversal. (Healea v. Keenan, 244 Ill. 484; French v. French, 215 id. 470.)

Appellee's book of account was properly admitted in evidence, although it was crudely kept and had certain leaves torn from it by the justice of the peace, who sought to separate the account sued on from other items not related to this controversy.

Complaint is made of alleged prejudicial conduct on the part of counsel for appellee. The bill of exceptions does not include the remarks of which complaint is made. An attempt to present the matter by affidavit has been made. It cannot be done in that way. (Bellinger v. Barnes, 223 Ill. 121; Austin v. Public Service Co., 219 Ill. App. 187.)

it was given; and that it was not later find that [illegible] a balance of $1.50 due him. It is his contention [illegible] check for $1.00 was given on account only.

Appellant argues in his brief that [illegible] irreconcilable. Certain it is, [illegible] the facts in the case. [illegible] and record, and the conclusions of [illegible] to the facts material or immaterial. [illegible] and his witnesses is to be believed, [illegible] remained in his favor, but if the testimony [illegible] his witnesses is true, then [illegible] [illegible] another in the circuit court [illegible] instances, the issues were [illegible] the circumstances, [illegible] the trial court in [illegible] entitled to great weight. [illegible] in much better position to [illegible] and to determine the [illegible] than is a reviewing court. [illegible] reason for the application of the rule [illegible] jury and the judgment of a trial court will not be disturbed unless such verdict and judgment are [illegible] the weight of the evidence [illegible] (Wolfe v. Beeman, 114 Ill. App. [illegible] v. [illegible] 10, [illegible])

[illegible] book of account was produced [illegible] evidence, although it was [illegible] from it by the [illegible] the account [illegible] to [illegible] inventory.

[illegible] is made of [illegible] [illegible] part of [illegible] for [illegible] [illegible] [illegible] to [illegible] be [illegible] in such way. (Gallimore v. [illegible], 22 Ill. [illegible] v. [illegible] Service Co., 110 Ill. App. 127.)

In the oral argument in this court, appellant urged that attorney's fees should not have been allowed because no sufficient notice was given before the bringing of the suit. That question was not raised in the trial court, nor is it among the assignments of error. It was stipulated that if plaintiff's attorney is entitled to fees under the notice and under the record that the usual, reasonable, and customary fee in such cases is $15 in the justice court and $35 in the circuit court. Finding no reversible error in the record, the judgment of the circuit court is affirmed.

Judgment affirmed.

In the oral argument in this court, appellant urged that authority has should not have been given effect because a sufficient notice was given before the [illegible] that question was not raised in the trial court, [illegible] the assignments of error. It was argued [illegible] authorities in addition to those which the [illegible] recited that the usual, reasonable, and [illegible] case is [illegible] the jurisdiction [illegible] finding to reversible error [illegible] the clerical court is affirmed.

[illegible]

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of February, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAY 5 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

JOHN FREEMAN AND EMMA FREEMAN, :
appellees, :
: APPEAL FROM CIRCUIT
v. : COURT OF LASALLE
: COUNTY.
SINCLAIR PIPE LINE COMPANY, a :
Corporation, appellant, :

JONES, P. J.

Appellees recovered a judgment against appellant for $150 on account of money paid out as attorney's fees under the terms of a right of way agreement between the parties. This appeal is prosecuted to reverse that judgment.

The record discloses that appellees and H. F. Sinclair entered into a written contract on the 10th day of November, 1916, by which appellees granted Sinclair the right to lay a pipe line across their tract of land. The contract provided for the payment of all damages which might arise from laying, maintaining, and operating such pipe line, and further, that such damages, if not mutually agreed upon, shall be ascertained and determined by three disinterested persons, one of whom shall be appointed by appellees, one by Sinclair, or his assigns, and the third by the two arbitrators already appointed. The award of the three arbitrators shall be final and conclusive. The contract was afterward assigned by Sinclair to appellant.

The agreement as originally drawn was not acceptable to appellees, and there was added a provision requiring the grantee to save the grantors harmless from all attorney's fees and court costs occasioned to them or incurred by them on account of the laying or maintenance of the pipe line through their land. In May, 1927, certain damages were caused to appellees' land through the operation of the pipe line, for which they submitted a claim to appellant. Interviews between Freeman and one Moulton, an agent of appellant, relative to the claim for damages, were had in June and August of that year, but no

settlement was reached. Thereafter, appellees employed an attorney who attempted to collect the claim without litigation. Negotiations extended over a period of several months and finally culminated in the selection of arbitrators, who made an award of $512 to appellees. The award was dated May 26, 1928, but was not signed by the arbitrator named by appellant until June 2nd, after some correspondence between the attorneys for the respective parties.

It is the contention of appellant that the award made by the arbitrators was a settlement in full of all matters in dispute between the parties; and by accepting the award, appellees waived any further claim for damages or attorney's fees; that appellant was always ready to arbitrate the question of damages; and that it was unnecessary for appellees to employ an attorney.

The record shows that the controversy extended over a period of more than a year. A portion of the services rendered by appellees' attorney was performed between the time the award was made and its payment. Appellants were represented by their claim adjuster and later by their attorney.

The contract did not provide for any arbitration of questions concerning attorney's fees. By its terms, the only matter to be submitted to arbitration was the amount of damages which might arise from laying maintaining, and operating a pipe line through the premises in question. The arbitration agreement did not include the subject of attorney's fees. The record discloses that in making the award, attorney's fees were not considered as an element of damages. After the award had been made, appellant's attorney sent to appellees' attorney, two checks covering the award and the expenses incident to it. In the letter accompanying the remittance, appellant's counsel stated that the defendant was not liable for attorney's fees. It is contended that by reason of such letter, appellees' act in cashing the checks amounted to an acceptance of them in full of all claims, and was a waiver of all demands for attorney fees.

settlement was reached. Thereafter, appellees [illegible]
attorney who attempted to collect the claim without [illegible].
[illegible] was allowed [illegible] period. A [illegible]
finally [illegible] to the [illegible]
an award of $[illegible] to appellees. [illegible]
1928, but was not signed by the [illegible]
until June 3rd, after [illegible]
for the respective [illegible].

It is the [illegible]
made by the [illegible] a [illegible]
in dispute between the parties and [illegible]
appellees raised [illegible] claim [illegible]
fees; that appellant was always ready to [illegible]
tion of [illegible] and that [illegible]
employ an attorney.

The record [illegible]
period of more than [illegible] years. A [illegible]
by appellant's witnesses [illegible] which the [illegible]
was made and the property. [illegible]
[illegible] and [illegible] by their witnesses.

The [illegible] and [illegible]
[illegible] [illegible] [illegible] [illegible]
rather to be considered in [illegible] the amount [illegible]
which might arise from [illegible] relationship, and [illegible]
line through the property in question. The [illegible]
[illegible] the subject of attorney's fees. [illegible]
[illegible] that in [illegible] owner, [illegible]
[illegible] as an element of [illegible]. [illegible]
made, appellant's attorney sent to appellees' [illegible]
[illegible] covering the [illegible]
the letter accompanying the [illegible]
stated that the defendant was not [illegible]
it is contended that by reason of [illegible]
and in making the [illegible]
in full of all claims, and was a [illegible]
attorney fees.

We cannot agree with this contention. According to our interpretation of the contract, the question of liability for attorney's fees was not made the subject matter for arbitration. It therefore follows that an acceptance of the amount due on the award, including expenses of the arbitrators did not preclude appellee from making a claim for necessary attorney's fees. The course followed in presenting the various claims was in accordance with the provisions of the contract and appellees cannot be held to have waived their claim to attorney's fees, because they accepted the amount due on the award.

The trial court committed no reversible error in giving or refusing instructions. The verdict is sustained by the evidence and the judgment is accordingly affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
OCTOBER TERM, A. D. 1928.

TERM NO. 32. AGENDA NO. 3.

INDUSTRIAL ACCEPTANCE CORPORATION, Appellee, : APPEAL FROM THE COUNTY
VS. : COURT OF MARION COUNTY.
ILLINOIS BOND AND INVESTMENT CO., Appellant. :

WOLFE, J.

On March 1, 1928, the Illinois Bond and Investment Company secured, in the Circuit Court of Marion County, two judgments against T. E. Sharp and W. A. Bauer, doing business under the firm name of Sharp & Bauer. The judgments were obtained upon narr and cognovit being filed in two separate actions. The record does not disclose when the obligations were contracted, upon which the judgments were secured, nor the nature of such obligations nor the facts and circumstances giving rise to their origin and formation. The bareness of the record in these respects is alluded to, because it is one of the material elements forming the foundation of the decision of this Court, as will appear later on in this opinion. On the same day the judgments were secured, executions were issued on said judgments and the Sheriff of Marion County, in obedience to the command contained in one of the executions, and on March 8, 1928, levied on the automobiles which are in question in this case. When the levy was made, the cars were in a garage in Centralia which is referred to by the witnesses as the Sharp and Bauer Garage, although Sharp had, on July 10, 1927, withdrawn from the firm of Sharp & Bauer, and Bauer alone was in charge of

the garage; the firm of Sharp & Bauer ceased to do business in February, 1928.

On about March 19, 1928, the Industrial Acceptance Corporation, the appellee herein, served a written notice on the Sheriff claiming to be the rightful owner of eight of the cars so levied on and to try the rights of property under the statute in such cases made and provided. The Industrial Acceptance Corporation thereupon became plaintiff and the Illinois Bond and Investment Company became defendant in the trial to try the rights of property in the Marion County Court. A jury was waived and, upon a hearing, the County Court decided that the plaintiff was entitled to the possession of the property and entered judgment in its favor against the defendant, which has appealed the case to this Court. Hereinafter in this opinion, the appellee, the Industrial Acceptance Corporation, and the claimant of the automobiles, will be referred to as the plaintiff, and the appellant, the judgment creditor, will be designated as the defendant.

The evidence shows that the firm of Sharp & Bauer for a number of years before July 12, 1927, has been engaged in the garage business and in buying and selling automobiles at retail in Centralia. This firm apparently held the agency for the Studebaker car, but in the course of business they also became the owner of all of the eight cars in question, which were second hand or used automobiles. One of the automobiles, a Cole sedan, was sold by Sharp & Bauer, on August 24, 1926 to W. E. Salisbury who, to secure the purchase price of said automobile which was payable in monthly payments, executed and delivered to Sharp & Bauer a chattel mortgage on said automobile which was given by him to secure his installment note given for the purchase price of said automobile. On October 11, 1926, Sharp &

Bauer sold one of the automobiles, a Studebaker touring car, to Thomas Herbert, who also executed an delivered to Sharp & Bauer a chattel mortgage on the car purchased by him and which was given to secure his installment note for the purchase price of said automobile. On August 24, 1926, the Salisbury chattel mortgage was assigned by Sharp & Bauer to the plaintiff and on October 11, 1926 they assigned the Herbert mortgage to the plaintiff. The mortgages provided that the property described in the mortgage should remain in the possession of the mortgagor as long as the mortgagee deemed said property and said debt secure and the conditions of the mortgage were being fulfilled.

The other six cars levied upon had been sold by Sharp & Bauer to various persons under conditional sale contracts and these contracts were assigned by Sharp & Bauer to the plaintiff in the months of February and April, 1927. These contracts provided, inter alia, that the title to said cars should remain in Sharp & Bauer until all amounts due on the purchase price, which was payable in monthly installments as evidenced by notes, should be paid; that negotiation of the contracts should not operate to pass title from the seller to the purchaser. Both the chattel mortgages and the conditional sale contracts provided that the purchaser was not to use the automobile for taxicab purposes, nor mortgage, assign, incumber or dispose of said car or remove it from the County where then located; that should the purchaser fail to pay the installments or to violate any terms of the mortgages or contracts or commit any act of bankruptcy, or if any execution, attachment or other writ should be levied on any of purchaser's property, then the seller might take possession of the car and sell the same, for the purpose of satisfying the amount due under the terms of the mortgages or contracts.

The mortgages and contracts also contained a provision making them binding upon the heirs, executors, administrators, successors and assigns of the respective purchasers and the seller. The assignment and delivery of the notes secured by the chattel mortgages and the conditional sale contracts is in no manner questioned or contested in this case. The chattel mortgages and conditional sale contracts were introduced in evidence on the trial by the plaintiff to establish its title to the cars.

The assignments of the contracts appear on the backs thereof and contain a guaranty by Sharp & Bauer of the payment of the notes given for the purchase prices of the cars. The assignments are lengthy and the defendant does not contest their sufficiency to effect a complete assignment of the contract. Defendant does, however, contend that the assignments did not vest the title to the automobiles in the plaintiff, the assignee. The first paragraph of the assignments reads as follows: "For value received, the undersigned does hereby sell, assign and transfer to Industrial Acceptance Corporation, a Virginia Corporation, his, its, or their rights in and to the contract on reverse side hereof and the Motor Vehicle referred to therein and authorizes said Corporation to collect the amounts due thereunder and give receipt and acquittance therefor."

In support of this latter contention the defendant cites the case of General Motors Acceptance Corporation v. Arthaud Land Co., 118 Wash. 593, 204 P. 194. In the case thus cited the Supreme Court of Washington held that the assignee of a conditional sale contract was estopped by his conduct from asserting title against a bona fide mortgage of the seller of an automobile who was in possession of the car which was the subject matter of the suit. As

will appear from a reading of that case, the learned Judge who rendered the opinion assumed, without deciding, that the title to the automobile was in the assignee, this assumption being based on the case of State Bank of Black Diamond v. Johnson, 104 Wash. 550, which case does decide that the assignee of a conditional sale contract does take title to the property. To the same effect as the case of State Bank of Black Diamond, supra, is the later case of Redmon v. Andrews, 143 Wash. 102, 254 P. 453, where the same Court held that a seller, after transferring a conditional sale contract, parted with all title to goods covered thereby, citing as authority for this doctrine the case of State Bank of Black Diamond v. Johnson, supra. The defendant cites no authorities holding contrary to the law announced in the cases decided by the Supreme Court of Washington and which is supported by a number of authorities among which may be cited the following: Dillon & West v. Gruit, 38 Nev. 46, 144 P. 741; Robinson v. Pipe Organ Maintainance Co. (N.J.) 139 Atl. 438; Spoon v. Framback, 83 Minn. 301, 86 N. W. 106; Standard Steam Laundry v. Dole, 22 Utah, 311, 61 P. 1103; Barton v. Groseclose, 11 Ida. 227, 81 p. 623; Blashfields Cyclopedia of Automobile Law, page 2380, section 150.

The evidence further shows that all of the cars were repossessed and placed in the garage of Sharp & Bauer before they were levied upon by the Sheriff and before the defendant had any lien, claim or interest on or in the cars, so far as is disclosed by the record now before this court. It is true that none of the witnesses were able to testify on what precise day any of the cars were repossessed, but the uncontradicted testimony of T. E. Sharp and W. A. Bauer was to the effect that both mortgaged cars had been repossessed before the firm of Sharp & Bauer had ceased

doing business and which was in February, 1928. Sharp testified that the Cole sedan (the Salisbury car) was repossessed while he was still a member of the firm, so the repossession must have taken place before July 10, 1927. Bauer testified that the Studebaker touring car (the Herbert car) was repossessed some months before the firm went out of business. Bauer also testified that all the cars were repossessed by Sharp & Bauer, and that they were in possession of Bauer on the day they were levied on is undisputed. Some of the cars were repossessed by agents of the defendant, being other persons than Sharp & Bauer, and the other cars were taken by Sharp & Bauer and placed in the garage. Owing to these circumstances the witnesses were unable to state whether the cars were directly repossessed by the defendant or if Sharp & Bauer took possession of the car.

Mt. Sharp and Mr. Bauer, speaking of all the cars in question, testified that they repossessed the cars for the defendant and that they had authority to sell the cars. W. M. Jacobs, a financial agent for the plaintiff, testified that Sharp & Bauer notified the defendant that the cars had been repossessed, and that they had power to repossess the cars under the general plan or arrangement of the plaintiff to repossess cars after default made by the purchaser. This arrangement was contained in a booklet of forms issued by the plaintiff and one of the paragraphs of the booklet was introduced in evidence. This paragraph is as follows: "Repossession: In the event of inability of I. A. C. or the dealer to make collection from the purchaser on a retail offering, repossession will be made for the dealer by I. A. C. at its discretion, or by the dealer, depending on which one can handle it most conveniently." After the sale of a car, Sharp & Bauer would remit to the plaintiff the money realized from the sale either in full or in partial

payment of the amount due under the mortgage or conditional sale contract securing the cars so sold.

After a consideration of all the testimony in the case, together with the proof that the plaintiff was the assignee of the mortgages and contracts, it is our opinion that Sharp & Bauer were the agent of the plaintiff when they repossessed and remained in charge of the cars. In support of this opinion we cite the case of General Motors Acceptance Corporation v. Arthaud, 118 Wash. 593, 204 P. 194.

Considering all of the evidence in the case with attending circumstances, together with the fact that the defendant was the assignee of the mortgages, we do not think that the trial court erred in holding that the title to the mortgaged cars was in the plaintiff. In support of this conclusion attention is called to the following propositions of law as the same are laid down in the case of Talty v. Schoenholz, 224 Ill. App. 158. "In Pike v. Colvin, 67 Ill. 227, it was held that until a breach of the condition of a chattel mortgage, the mortgagor holds a contingent interest in the property that is liable to levy and sale on execution or attachment. But after the maturity of the debt, or failure of the condition upon which the mortgagor may retain possession, the mortgagee has the right to reduce the same to possession and, having done so, he has the legal right to retain it and an execution or attachment cannot deprive him of that right. Durfee v. Grinnell, 69 Ill. 371. Also in the case of Springer v. Lipsis, 110 Ill. App. 109 affirmed in 209 Ill. 261, it was held that a mortgagee having acquired lawful possession of the mortgaged goods may turn that possession over to anybody, even to the mortgagor, as his agent, without the loss of any of his rights.

It is contended by the defendant that the cars secured by the Herbert mortgage is void for the reason

that the same was not acknowledged by the maker in conformity with the statute, attention is called to the case of Springer v. Lipsis, supra, where it is decided that even though a chattel mortgage does not create a lien as against third persons, the taking of possession of the mortgaged property makes the mortgage good,, although not acknowledged, even against an execution creditor. The assignment of the notes secured by the chattel mortgages is not contested in this case, therefore the case of Ensley Lumber Co. v. Lewis, 121 Ala. 94, 25 So. 729, and cited by the defendant, is not in point.

The main question in this case is raised by the contention of the defendant that the plaintiff by its conduct in leaving the cars in the possession of Sharp & Bauer, coupled with their actual, or apparent, authority to sell the cars, estops the plaintiff asserting title to the automobiles as against their claim and right as a judgment creditor of Sharp & Bauer. The evidence shows, as testified by Deputy Sheriff Barnhill, that the cars, when levied on, were on the second floor of the Sharp & Bauer garage where they were stored with other automobiles in Storage there. Sharp testified that his firm repossessed the cars for resale, placed them on their floor to resell, holding out to the public that they had the right to resell the cars. Bauer testified, in substance, that the repossessed cars were put on the floor of Sharp & Bauer and offered for sale and the firm held out to prospective buyers that they had the right to sell and convey the cars; that a number of the cars had been sold that way. As before stated, when one of the cars was sold the proceeds were paid to the plaintiff to apply on the debt secured by the chattel mortgage or conditional sale contract on the cars sold.

From the evidence in the case, we find that

when the cars were levied on the title thereto was in the plaintiff and the cars were in the store room of the garage of Sharp & Bauer for the purpose of sale by Bauer; that the plaintiff by its course of dealings with Sharp & Bauer, as shown by all the proof in the case, must have known, at its peril, that the cars were in the Sharp & Bauer garage being held out for sale by Bauer. General Motors Acceptance Corporation v. Arthaud Land Co., 118 Wash. 593, 204 P. 194.

For the purpose of discussing the principles underlying this opinion, it may be conceded, under the authority of the case of Illinois Bond and Investment Co. v. Gardner, 249 Ill. App. 337, that a bona fide purchaser, for value, and defending against the claim of ownership by the plaintiff, would have received title to one of such repossessed cars from Sharp & Bauer under the doctrine of estoppel announced in that case. The question now before the Court is, if a judgment creditor can invoke the doctrine of estoppel against the true owner of the goods levied on where the latter has intrusted the custody of the property to another with power to sell the same, and, furthermore, it not appearing that the creditor had in any manner given up anything of value or changed his position to his loss or prejudice in reliance upon such possession and authority of the custodian of the goods.

It is universally held that, as one of the essential elements of estoppel, that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the conduct of the person sought to be estopped. 21 C. J. 1133; Sherer-Gillett Co. v. Long, 318 Ill. 432; Sutter v. Peoples' Gas Light and Coke Co., 284 Ill. 634. The doctrine of estoppel should not be applied unless the conduct relied upon as creating an estoppel has been of such a character, and has resulted in such injury

to the person relying upon such conduct, that in equity and good conscience, he thereby is prohibited from enforcing the legal rights which he would have otherwise, nor unless in any given case, all the elements exist which have been universally held to be essential for the purpose of creating an estoppel. -- Rogers v. Portland & B. St. Ry. 100 Me. 86 70 L. R. A. 574.

In conformity with these principles, the rule than an owner of personal property who has clothed another with apparent ownership or authority to sell the property is not estopped to assert ownership, unless the person alleging the estoppel has acted and parted with value upon the faith of such apparent ownership or authority so that he will be the loser if the appearances to which he trusted are not real. 21 C. M. 1179; McGregor v. Sibley, 69 Pa. 388; Grubel v. Busche, 75 Kan. 820, 91 P. 73; Albright v. Albright, 151 Wis. 610, 139 N. W. 413; "and in this respect it does not differ from other estoppel <u>in pais</u>" -- Bernard v. Campbell, 55 N. Y. 456, 14 Am. R. 289.

Our Courts have held that personal property left with an agent with actual authority from the owner to sell the property, the agent being required to account for the proceeds when sold, is not subject to sale under judgment obtained against such agent. Loomis v. Barker, 69 Ill. 380; Buffalo Gasoline Motor Co. v. Atwood, 159 Ill. App. 28; and Conzino v. Brents, 123 Ill. App. 613, holding judgment creditor parted with no value.--Buffington vs. Gerrish, 15 Mass. 156; Globe Co. vs. Jennings, 59 Atl. 239; Schweizer v. Tracey, 76 Ill. 345; Walsh Boyle & Co. v. First Nat. Bank, 228 Ill. 446; Nonotuck Silk Co. v. Levy, 75 Ill. App. 55; Gorzino v. Brents supra; In Re Gold (Under Ill. Law) 210 Fed; Hartford v. Stout, 102 Wash. 241. 172 P. 1168; Orcutt v. Gast, 231 Mass. 305, 120 N. E. 855.

In the case at bar there is no evidence that the defendant extended credit on the strength of the possession of the automobiles by Sharp & Bauer or that it lost anything on reliance of such possession, coupled with the right to sell, if they did so rely. There is no evidence that Sharp & Bauer had any other property which might have been seized or garnisheed by the defendant to secure the payment of its debt, and that, relying upon the conduct of the plaintiff they neglected to seize other property or garnishee other indebtedness to Sharp & Bauer, (Warder v. Baker - Wis. -- 11 N. W. 342.) After a careful consideration of the facts in this case and the principles above stated, we hold that the plaintiff in this case is not estopped to assert its titles to the property in question.

We have discussed these principles and matters at such length for the reason that the defendant places great reliance on the case of Drain v. La Grange State Bank, 303 Ill. 330, which case it is strongly urged announces a proposition of law that is controlling in this case. The facts in the case cited are in no wise similar to the ones in the case at bar.

We do not consider the Drain case as in any manner reversing or modifying the case of Schweizer v. Tracey, 76 Ill. 345, and which is the leading case in this State holding that an attachment or judgment creditor is not a bona fide purchaser for a valuable consideration. The Schweizer case has been cited with approval, among others, in the following cases: Walsh Boyle and Co. v. First Nat. Bank, 228 Ill. 446; Nonotuck Silk Co. v. Levy, 75 Ill. App. 55 (judgment creditor); Magerstadt v. Schaefer, 100 Ill. App. 171, (judgment creditor); Hacker v. Munroe and Son, 176 Ill. 394; King and Co. v. Brown, 24 Ill. App. 579.

Gould v. Howell, 32 Ill. App. 349; O'Neil v. Patterson and Co. 52 Ill. App. 27; La Salle Pressed Brick Co. v. Coe, 65 Ill. App. 619; Link v. Gibson, 93 Ill. App. 433.

The judgment of the County Court of Marion County is affirmed.

AFFIRMED.

Not to be reported in full.

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